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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. ~~336.~~ 115

REUBEN P. SEGRIST, SIM HOLSTINE, WILLIAM B. STAPP, BENJAMIN STOOPS, AND FRANK E. BELL, PLAINTIFFS IN ERROR,

vs.

WILLIAM B. CRABTREE.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

FILED OCTOBER 13, 1885.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. 386.

REUBEN P. SEGRIST, SIM HOLSTINE, WILLIAM B. STAPP, BENJAMIN STOOPS, AND FRANK E. BELL, PLAINTIFFS IN ERROR,

vs.

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IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

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a UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the supreme court of the Territory of New Mexico, Greeting :

Because that in the records and process and also in the rendering of judgment in the said supreme court of the Territory of New Mexico, before you, in a suit between Reuben P. Segrist, Sim. Holstine, William B. Stapp, Benjamin Stoops, and Frank E. Bell, plaintiffs in error, and William B. Crabtree, defendant in error, a manifest error has intervened, to the great damage of the said Reuben P. Segrist, Sim. Holstine, William B. Stapp, Benjamin Stoops, and Frank E. Bell, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, the present seat of the National Government, on the second Monday in October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid
b being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 27th day of May, in the year of our Lord one thousand eight hundred and eighty-five.

[Seal Supreme Court, Territory of New Mexico.]

C. M. PHILLIPS,
Clerk Supreme Court, Territory of New Mexico.

c I hereby make return to the within writ by annexing to and returning with the same an authenticated transcript of the record, citation to the adverse party, and a copy of the opinion of the supreme court of the Territory of New Mexico filed in said cause.

C. M. PHILLIPS,
Clerk Supreme Court, Territory of New Mexico.

1 [Endorsed:] 213. Territory of New Mexico supreme court. Reuben P. Segrist *et al.*, plaintiffs in error, *vs.* William B. Crabtree, defendant in error. Writ of error to supreme court of the Territory of New Mexico. Filed May 27th, 1885. C. M. Phillips, clerk supreme court, Territory of New Mexico.

2 Supreme Court of the Territory of New Mexico.

WILLIAM B. CRABTREE *vs.* REUBEN P. SEGRIST *et al.*

WILLIAM B. CRABTREE, Appellee,
vs.
REUBEN P. SEGRIST *et al.*, Appellants.

Be it remembered that heretofore, to wit, on the thirteenth day of December, 1884, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico the following transcript of record of the district court of the first judicial district of said Territory within and for the county of San Miguel in the above-entitled cause; which said transcript was and is in the words and figures following, to wit:

3 *Transcript.*

In the Supreme Court of the Territory of New Mexico. January Term, 1885.

WILLIAM B. CRABTREE *vs.* REUBEN P. SEGRIST *et al.*

Trover.

Lee & Fort, attorneys for appellee; Catron, Thornton & Clancy, attorneys for appellant.

4 TERRITORY OF NEW MEXICO,
First Judicial District, County of San Miguel:

Be it remembered that heretofore, to wit, on the second day of June, 1882, William B. Crabtree, by his attorneys, filed in the clerk's office of the first judicial district court within and for the county of San Miguel his declaration in trover; which said declaration is in words and figures following, to wit:

TERRITORY OF NEW MEXICO, } ss:
County of San Miguel, }

In the District Court of the First Judicial District of the Territory of New Mexico, sitting in and for the trial of causes arising under the laws of the Territory aforesaid, at the August term of said court, A. D. 1882.

To the Honorable L. Bradford Prince, chief justice of the supreme court of the Territory of New Mexico and judge of the first judicial district thereof:

Your petitioner, William B. Crabtree, a resident of the county of Young, in the State of Texas, complains of Reuben P. Segrist, resident of Lincoln county, Territory of New Mexico, and Sim. Holstine, William B. Stapp, Benjamin Stoops, and Frank E. Bell, residents of the county of San Miguel and Territory of New Mexico, in a plea of trespass on the case.

For that whereas the said William B. Crabtree, on the 28th day of January, A. D. 1882, at the county of San Miguel, in the Territory of

New Mexico, was possessed of certain goods, chattels, and live stock of large value, to wit: One hundred head of beef steers, ten head of bulls, one hundred head of two-year-old cattle, one hundred head of yearlings cattle, one hundred and twenty-five head of cows and one hundred head of calves and seven head of horses, of the value of twelve thousand dollars, as of his own property, goods, chattels, and live stock; and, being so possessed thereof, he, the said William B. Crabtree, afterwards, to wit, on the same day and year aforesaid, at the county of San Miguel and Territory aforesaid, casually lost the same goods, chattels, and live stock out of his hands and possession, which said goods, chattels, and live stock afterwards, to wit, on the day and year aforesaid, at the county and Territory aforesaid, came to the hands and possession of the said Reuben P. Segrist, Sim. Holstine, William B. Stapp, Benjamin Stoops, and Frank E. Bell, who found the same, yet the said Reuben P. Segrist, Sim. Holstine, William B. Stapp, Benjamin Stoops, and Frank E. Bell, well knowing the said goods, chattels, and live stock of the said William B. Crabtree and of a right to belong and appertain unto him, the said plaintiff, but contriving to deceive and defraud the said William B. Crabtree in this behalf, has not as yet delivered the said goods, chattels, and live stock or any or either of them or any part thereof to the said plaintiff, although often requested so to do, but, on the contrary thereof, they, the said Reuben P. Segrist, Sim. Holstine, William B. Stapp, Benjamin Stoops, and Frank E. Bell, afterwards, to wit, on the day and year aforesaid, converted and disposed of said goods, chattels, and live stock to their own use, to the damage of the plaintiff in the sum of twelve thousand dollars; the plaintiff therefore brings suit and asks judgment for twelve thousand dollars and for costs of suit.

ALFRED B. SAGER,
LEE & FORT,
Attorneys for Plaintiff.

And afterwards, to wit, the said defendant, Segrist, on the 8th day of August, 1884, filed in said clerk's office his plea; which said plea is in the words and figures following, to wit:

District Court, County of San Miguel. August Term, 1884.

WILLIAM CRABTREE *vs.* WILLIAM B. STAPP *et al.*

Trover.

And the said defendant Segrist, by his attorney, comes and defends the wrong and injury, when, etc., and says that he is not guilty of the said supposed grievances above laid to his charge or any or either of them, in manner and form as the said plaintiff has above thereof complained against him, and of this he puts himself upon the country, etc.

CATRON, THORNTON & CLANCY,
Attorneys for Segrist.

And afterwards, to wit, on the same day and year last aforesaid, said defendants Stapp, Stoop, and Holstine filed their plea in said clerk's office; which said plea is in the words and figures following, to wit:

District Court, County of San Miguel. August Term, 1884.

WILLIAM B. CRABTREE *vs.* WILLIAM B. STAPP *et al.*

Trover.

And the said defendants Stapp, Stoop, and Sim. Holstine, by their attorneys, come and defend the wrong and injury, when, etc., and say that they are not guilty of the said supposed grievances above laid to their charge or any or either of them, in manner and form as the plaintiff has above thereof complained against them, and of this the said defendants put themselves upon the country, etc.

CATRON, THORNTON & CLANCY,
Attorneys for said Defendants.

Be it remembered that at a regular term of the first judicial district court of the Territory of New Mexico, begun and held within and for the county of San Miguel, for the trial of causes arising under the laws of said Territory, at the court-house of said county, in the town of Las Vegas, on the first Monday of August, in the year one thousand eight hundred and eighty-four, and on the fifth day of said term, the same being Friday, August 8, 1884, the following, among other, proceedings were had, to wit:

7

WILLIAM B. CRABTREE
vs.
WILLIAM B. STAPP *et al.* } 1391.

Trover.

Now comes the said plaintiff, by his attorneys, Messrs. Lee and Fort, and said defendants come, by their attorneys, T. B. Catron and W. T. Thornton, Esquires; and, issue having been heretofore joined between said parties, thereupon comes a jury, to wit, Ramon Flores, Jacob Gross, Jesus Trujillo y Quintana, J. J. Fitzgerrell, C. A. Rathbun, M. L. Cooley, Juan Jose Nieto, Lorenzo Valdez, Theo. Rutenbeck, Antonio Archuleta, Antonio Sanches, Victor Lucero, twelve good and lawful men of the body of the county, who, being sworn the truth to speak upon the issues joined between said parties, hear the evidence on behalf of the said plaintiff.

And afterwards, to wit, on the sixth day of the same term aforesaid, the same being Saturday, August 9, 1884, the following, among other, proceedings were had, to wit:

WILLIAM B. CRABTREE
vs.
WILLIAM B. STAPP *et al.* } 1391.

Trover.

Now again come said parties, by their respective attorneys, and again come the jurors heretofore empaneled herein, who, after hearing the remainder of the evidence, the arguments of counsel, and the instructions of the court, upon their oaths do say that they find the defendants guilty, and assess the damages of said plaintiff to six thousand six hundred and thirty-three dollars and four cents; and thereupon the said defendants give notice of a motion for a new trial herein.

And afterwards, to wit, on the seventh day of the same term aforesaid, the same being Monday, August 11, 1884, the following, among other, proceedings were had, to wit:

8 WILLIAM B. CRABTREE
vs.
REUBEN P. SEGRIST, WILLIAM B. STAPP, and BENJAMIN STOOPS. } 1391.

Trover.

Now come said defendants, by their attorney, W. T. Thornton, Esq., and move the court to set aside the verdict of the jury heretofore entered herein and to grant them a new trial for reasons set forth in their motion on file, and said motion being submitted without argument the court, being sufficiently advised in the premises, denies the same. It is therefore ordered by the court that said motion be, and the same hereby is, denied; and thereupon, in accordance with said verdict, it is considered by the court that said William B. Crabtree recover of said Reuben P. Segrist, William B. Stapp, and Benjamin Stoops the sum of six thousand six hundred and thirty-three dollars and four cents, the amount of his damages assessed as aforesaid, together with his costs in this behalf expended, to be taxed, and that he have execution therefor.

And afterwards, to wit, on the day and year last aforesaid, August 11th, 1884, the said defendants, by their said attorney, filed in said clerk's office their motion and affidavit for appeal; which said affidavit and motion are in the words and figures following, to wit:

TERRITORY OF NEW MEXICO, *County of San Miguel:*

In the District Court of the First Judicial District. August Term, A. D. 1884.

WILLIAM B. CRABTREE, Plaintiff,
against
REUBEN P. SEGRIST *et al.*

Reuben P. Segrist, having been first duly sworn, upon oath states

that he is one of the above defendants, and that the defendants have been injured and aggrieved by the judgment herein, and that justice has not been done them herein, and that this motion for ap-
9 peal is not made for vexation or delay, but that defendants may have justice done them.

—— ——.

Subscribed and sworn to before me this the 11th day of August, A. D. 1884.

C. M. PHILLIPS, *Clerk*,
By S. BURKHART, *Deputy*.

For the grounds set forth in the above affidavit defendants pray that an appeal be granted them in this case to the supreme court of this Territory.

CATRON, THORNTON & CLANCY,
Attorneys for Defendants.

And afterwards, to wit, on the day and year last aforesaid, August 11th, 1884, the said defendants filed in said clerk's office their bond for stay of execution on judgment; which said bond is in the words and figures following, to wit:

Know all men by these presents that we, Reuben P. Segrist, as principal, and William B. Stapp and William Robert, as securities, all residents of the Territory of New Mexico, acknowledge ourselves to owe and stand indebted to William B. Crabtree in the sum of eight thousand dollars; for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators.

The condition of the above obligation is such that whereas the above-named W. B. Crabtree has recovered judgment in the district court of San Miguel county against the above-bounden R. P. Segrist *et al.* in the sum of six thousand six hundred and thirty-three dollars; and whereas the said R. P. Segrist *et al.* have appealad from said judgment to the supreme court of New Mexico: Now, if said appellants shall prosecute said appeal with effect and pay all judgment, costs, and damages that may be adjudged against them in the supreme court in case said judgment is affirmed, or pay the judgment already rendered in case said appeal be dismissed, then this obligation to be void; otherwise to remain in full force and effect in law.

10 In witness whereof we have hereunto set our hands and seals this the 11th day of August, A. D. 1884.

R. P. SEGRIST. [SEAL.]
WM. B. STAPP. [SEAL.]
WILLIAM ROBERT. [SEAL.] .

And afterwards, to wit, on the same day of the same term last aforesaid, the same being August 11, 1884, the following further proceedings were had, to wit:

WM. B. CRABTREE
vs.
REUBEN P. SEGRIST *et al.* } 1391.

Trover.

Now again come said defendants, by their attorney, W. T. Thornton, Esq., and move the court to grant them an appeal from the judgment of this court to the supreme court of the Territory of New Mexico, for reasons set forth in their motion and accompanying affidavit on file, and said motion being submitted to the court without argument, the court, being sufficiently advised in the premises, grants the same. It is therefore ordered by the court that said defendants be, and they hereby are, granted an appeal from the judgment of this court in this cause to the supreme court of the Territory of New Mexico; and it appearing to the court that said defendant Segrist, together with William B. Stapp and William Robert, two sufficient securities, have entered into a recognizance to the said William B. Crabtree in the sum of eight thousand dollars, the amount fixed by the court, conditioned that said defendants and appellants shall prosecute their appeal with due diligence to a decision in the supreme court, and that, if the judgment herein be affirmed or the appeal be dismissed, *that* they will perform the judgment of the district court, and that they will also pay the costs and damages that may be adjudged against them on said appeal, it is ordered that said bond be, and the same hereby is, approved, and that the execution on the judgment herein be, and the same hereby is,
11 stayed until the decision of the said supreme court may be had in the premises; and it is further ordered that the time of filing the proposed record herein be, and the same hereby is, extended until the first day of November, 1884.

And afterwards, to wit, on the 30th day of October, 1884, at the chambers of the chief justice, at Santa Fé, N. M., the following order was made, to wit:

WILLIAM B. CRABTREE
vs.
WILLIAM B. STAPP *et al.* } 1391.

Trover.

It is ordered by the court that the defendants be, and they hereby are, allowed until December 1st, 1884, to prepare the record and bill of exceptions in this case and to serve a copy of the same upon the plaintiff's attorneys.

S. B. AXTELL,
Chief Justice, etc.

And afterwards, to wit, on the 1st day of December, 1882, the said defendants filed in said clerk's office their bill of exception; — was and is in the words and figures following, to wit:

TERRITORY OF NEW MEXICO, *County of San Miguel:*

In the District Court of the First Judicial District of the Territory of New Mexico, Sitting in and for the County of San Miguel, at the August Term, 1884.

WILLIAM B. CRABTREE *vs.* REUBEN P. SEGRIST.

And now, at this day, this cause coming on to be heard, and both parties announcing themselves ready for trial, and a jury having been called and accepted, the same is taken up, when the following proceedings were had:

The plaintiff, to support his case, offered in evidence the following testimony:

WILLIAM B. CRABTREE, being duly sworn, testified as follows:

Reside in Texas; have lived there eleven years. In 1880 lived in Calahan county; was then driving and working in cattle. In the early part of 1880 I had about 125 of my own. On July 20th bought a remnant of cattle of W. M. Babb. My brother, J.
12 E. Crabtree, and myself bought the cattle jointly. Babb proposed to sell a remnant of cattle to my brother and myself; made no trade at that time, but a couple of weeks later I saw him and contracted for them for $1,000. We met at Babb's house and drew up some notes to Babb for the cattle; drew two notes, one payable in September, 1881, and the other in Sept., 1882. Babb reserved 10 cows and calves out of the remnant. The first note was for $800.00 and the second for the same amount. Myself and brother signed the notes. Babb made a bill of sale and kept a copy. This is a copy. I got this copy on the 25th of June, 1884. While we were in the court-house taking the depositions H. I. Babb came to the door and called me out. He stepped up to me and handed me a bundle of papers. It contained my notes. I did not know what it contained. It contained the notes and bill of sale. This is a copy of the bill of sale given by Babb to me. I gave the original to W. D. Lee. (Two notes were here shown witness, who says that they are the same notes given by him to Babb.) In pursuance of contract I went to work to gather the cattle; worked some four or five months. My brother and myself gathered about two hundred head and drove them to the Salt Fork of the Brazos, about 110 miles. These were driven there about the 25th of December, 1880. Next season I commenced gathering cattle, and drove out a bunch in June, 1881. In September, 1881, I drove a small bunch—72 head. When I got to the ranch on the Salt Fork we rounded up and gathered up all we could, in connection with the Carter boys. We bought two bunches of horses of Babb, at two different times—six at one time, in Nov., 1880, and four head in April or first of May, 1881. In gathering these cattle I gathered others of my own, most of which were branded WHIT. That is mine. WHIT, OD, THB, V^{A} were my brands before I registered the WHIT. I put the WHIT on record. I put WHIT on all I could gather. I had

125 head before buying of Babb. I moved them with those
13 of Babb to Salt Fork of the Brazos. I adopted the J O & M brand after purchasing from Babb. During the first year we did not put the J O & M on any of those I had. In the spring of 1881 I bought my brother's interest in all the cattle bought from Babb, and then put the J O & M brand on all cattle bought from any one. After driving the third bunch to Salt Fork we rounded up all we could, and all the cattle owned by me in connection with those owned by the Carter boys, and started them to New Mexico in October, 1881. I did not come with the cattle. Before going to New Mexico, of the cattle I owned we tallied out 175 of the cattle I bought from W. M. Babb and 155 or 6 with the WHIT and other brands of mine. I don't know how many of my cattle staid in Texas; there was left about 100 head not gathered up. I saw some of them I drove from Salt Fork to New Mexico at Las Conchas, in the possession of Stapp and Stoop. They said they had bought and paid for them—that is, those I saw. I did not see all of them. I met Mr. Segrist on Seven Rivers, in Lincoln county, in this Territory, in Sept., 1882. I had a judgment against him and others for $10,500. We talked about these cattle. He claimed he bought them of Babb. He said Babb claimed them as his own. As well as I remember, he said he sold the cattle to Stapp and Stoop. After I bought these cattle from Babb O U was put on these cattle by me. This was on the catle I had first, before buying from Babb. When the Carter boys started from Texas with cattle I found the greater part of the J O & M brand on other cattle sold by Babb to others, where the mark had been kept up, and I concluded to change and put on the O U brand. The Carter boys put this brand on all the small cattle and were to put it on all others if they had an opportunity. The different classes of cattle that I had and started for Texas were cows, calves, yearlings, twos, threes, fours, and fives; the larger portion were cows, the others were about an average herd, I should think of the value of $7,000 in Texas. I had seven
horses worth about $60 per head in Texas. I suppose the
14 cattle were worth about $7,000 to $8,000 in New Mexico; the horses, I suppose, were worth the same in New Mexico as in Texas.

Cross-examination:

When I bought from Babb I had 125 head. I had put most of my cattle in the WHIT brand; I bought it from W. I. Babb, the son of W. M. Babb. While in Texas I kept up the WHIT brand, until July, 1881. I kept up the WHIT brand while I kept the brands up which I bought from Babb, and I kept the same marks on them. The cattle I bought of W. M. Babb I continued in the J O & M brand; have paid none of the Babbs for the cattle; I don't know how many of the WHIT brand I started to New Mexico. There was about 150 head, besides the J O & M brand. I did not come to New Mexico with the cattle. Three Carter boys herded these cattle on the Salt Fork. I did not get permission to move the cattle from Salt Fork. Babb married an aunt of mine. I did not

know what the notes were when they were given up to me. Babb said what they were. I took them before he told me what they were. Mr. McGonigle was present. I understand that I bought the cattle out and out. I never understood that the cattle were not sold unless the notes were paid; never told Shipman that I got permission to take them to Salt Fork. I claim that I bought the horses from Babb, but I have not paid for them. I did not say to Mr. Shipman that the cattle were to fall back if notes were not paid; I never said so to Thomas Babb. I never stated to any one that the cattle were to stay on the range and not to be moved until paid for. One of the Carters came down in October. They had no interest in the cattle. My brother bought in in the start. My brother had cattle he bought and sold to the Carter boys after he drove them out there. We put J O M on all other cattle; never changed any J O & M brands. I kept it up. I bought several horses from Babb, and kept them up in the J O & M brand and same ear marks. All the increase of WHIT brand I kept up until I left Calahan
15 county; was not present when new brand was put on. It was put on in New Mexico. Salt Fork is about 110 miles from Babb's. Babb's is southeast 110 miles from Salt Fork; to where cattle were taken in New Mexico is a little northwest, about 200 miles. The O U brand was put on after they got in New Mexico; was present when cattle here started from Salt Fork. I think it was the first of October they left for New Mexico. It was after the first note was due. No ear marks were changed until they started for New Mexico. Nearly all the cattle I had, outside of J O M brand, were WHIT brand. There were other cattle that had the Babb brand on them that I bought in 1879. I bought some of them of W. I. Babb. I saw cattle there I bought of Brogden in possession of Stoop and Stapp. I had a O U on all the cattle; did not have the O U in different places. I don't know if Stoop and Stapp bought all the cattle brought to New Mexico. Some of the cattle brought to New Mexico were sold to Lynch; seven head were driven back with Carter cattle and sold to Lynch. I sold Lynch sixty-four head of O U brand; they were calves. This is the Brogdon brand, D O W. I think I saw some of that brand in the possession of Stapp and Stoop. I can swear I saw D O W in possession of Stapp and Stoop. I saw H N cattle with Stapp and Stoop; don't know how many. I saw some, but not half a dozen. I think I saw two; have never paid young Babb seven dollars a head for cattle bought from him. He turned them over to me. They were counted out to me; gave my note for them for $501.50. It is not a fact that I was to collect the cattle and pay for them seven dollars a head. He turned them over to me on the prairies. There was present a Mr. Shipman, I think, and others. It was not understood or agreed that the cattle were to remain on the range or title to remain in Babb. They were not all in one bunch. Young Babb was with me at the different places and times when they were got by me. I don't know that I could state the number turned over by young Babb
16 of his cattle. Between thirty-five and forty were brought to New Mexico; changed no brands on horses before leaving for

New Mexico. About 100 head of old man Babb's cattle, — I had a claim in, were left in Texas. The bulk of them I got from young and old Babb. I live in Young county, Texas. Babb lives in Coleman county. From where the cattle was taken from the Carter boys to where I live is about 500 miles. Mr. Babb, I understand, has plenty of means: also the young man; never had understanding that if the cattle were not paid for they were to fall back to old Babb, nor to young Babb; was given a year after the contract with young Babb. I bought forty-six head of cattle and six horses from young Babb. I bought the horses next spring, and note included both; cattle bought of young Babb were turned over on the range; can't state all the brands. Probably a quarter or a third had the WHIT; some had B brand. There were other brands. I don't now remember; some had AZ on hip. After I bought the brands from W. M. Babb he started a new brand. He did not use these brands. There was no other written contract or other paper signed about the cattle. There was no other contract between Babb and I about the cattle. I had conversations with regard to the cattle afterwards. He would speak of them as my cattle, etc. On several occasions he would say, "I had some of your cattle, etc., when he was looking up his horses. Shipman is a nephew of Babb by marriage. He works for Babb; is working for him now, and has been for the last fifteen years. There were of the WHIT brand brought to New Mexico sixty-five or sixty-four head of the cattle — had never been in any of the Babb brands. I had owned them. I bought twenty-two head from young Babb for work in 1879. I had twenty-three head before that. My reason for leaving Salt Fork, Texas, was that the Carter boys would not stay there. The water was bad and the cattle died off. The twenty-two or twenty-three head had the $\overline{O\ D}$ brand; saw some in the possession of Stapp and Stoop; did not examine the cattle critically, and did not go through the herd to examine it.

17 J. H. CARTER, being duly sworn on behalf of plaintiff, testified as follows:

Live in Baylor county, Texas; know plaintiff and Segrist. I worked with cattle claimed by Crabtree from 1880 to February, 1882. I don't know anything about the purchase of the cattle. It has been so long that I don't know if I can state everything. My brothers had charge for the two Crabtrees. They arrived December 25th, 1880, on brothers' ranch. We had charge until February, 1882. They brought three herds then. They were not tallied when they were turned loose. There were about two hundred and seventy or two hundred and eighty. I can call the brands—W hip and M side—on most of the cattle. They were, J O hip and M side; W hip and M side—5,000 side, — on shoulder; C7 hip. We held them from December, 1880, until October, 1881. We moved them from the Salt Fork of the Brazos to the Pecos river, near Sumner, with our cattle; cattle moved were 336, tallied on plains. W. I. Babb came there about February first, 1882; claimed the cattle for his father, and took them. There were eight head left with my brother. Babb took all the cattle Crabtree had there except eight head. The tally was made

in October, 1881. One died; one we eat for beef. Eight head of cattle were cut and left with my brother. I think those eight were sold to Lynch. When the cattle were taken Segrist, Babb, Norrell, and another were there. I saw the cattle were in Segrist's possession. I heard no conversation of Segrist as to how many there were. I spoke to Segrist a few moments about the cattle. I told him he could not hold them all, and he said he had bought and paid for them, and if he lost them Babb would pay him for them. I know of no cattle selling about that time. They were generally held at about $20.00. They were an average Texas stock cattle. I heard no conversation in Mr. Segrist's presence. W. I. Babb exercised the authority in taking the cattle. Babb asked my brother to come out and cut his cattle. My brother said he would not cut out the
18 cattle or deliver them. I was not at the herd when they got the herd. My brothers were. I don't think any one had permission to turn them over.

Cross-examination:

Cattle were turned loose from the 12th of November to February. My brothers had charge of those cattle for Crabtree. Crabtree was in Texas; he moved to Young county in September—about the last of September; about the time we left Texas. Mr. Norrell came with Babb the first day. I had no interest in Crabtree's cattle as I know of; never heard of any trade between my brothers and Crabtree. They were partners in a brand of their own, and both were agents, I think, of Crabtree. W. B. Crabtree was at Salt Fork on the day we moved; he said he had written to my father to come for his wife. After we took the cattle he started back—about twelve days after. My brothers took their cattle back; have not given list of all the brands of Crabtree; he had an individual brand. There were H N cattle branded on hips. One of them wore a bell and she went off in the herd. There was a WHIT brand. The lot of cattle first brought to Salt Fork were average cattle.

Redirect examination:

After the cattle were taken we went back to the plains, in Texas, about 175 miles east of where they took them from the Pecos.

JOHN E. CRABTREE, being duly sworn, testified as follows:

Live in Young county, Texas; know plaintiff; he is my brother; know W. M. Babb; have known him about four years. My brother and I bought J O & M and other cattle from W. M. Babb and gave notes for $1,600 in two payments, one payable September, 1881, and the other in 1882. We were to give our notes for the cattle on one and two years' terms. Babb offered to sell them to us. I told my brother and we went there. Babb had horses to run and could
19 not run the cattle; he had men out and was furnishing horses; they came in from a hunt and could find none; he then wanted to sell them. We bought the remnant of cattle, range delivery. Some papers were drawn up, notes and bill of sale and copy of bill of sale.

There was no agreement about cattle going back if not paid for. We bought cattle in July. We took about 190 head of cattle to Salt Fork the first time. There were about 150 head, of my knowledge, that my brother had of his own; they were branded VN hip, THB hip and side; also WHIT brand. I was not partner in any cattle except what I got from W. M. Babb. I only worked in the fall of 1880; don't know how many cattle were taken to Salt Fork after that; I staid there until the fall of 1881; went to take another herd to Salt Fork in June, 1881; we then took about 175 to Salt Fork. I have no interest in those cattle sold to my brother in the spring of 1881. I did not come to New Mexico.

Cross-examination:

Was present when contract was made; it was not at anybody's house; it was close to the house. We gave notes for them. Young Babb was there. I did not talk with him; if my brother did I don't know it. We all four were there. W. I. Babb got on his horse and went off after the agreement was made. I went to Salt Fork in July, 1881; staid there three or four days and went back to Callahan; don't know what county Salt Fork is in. Salt Fork is northwest from Babb's; did not go back there any more. My brother went to live at Graham county in the fall of 1881. Young Babb did not, as I know, make the contract for his father. There was nothing said about keeping the cattle upon the range; got no permission from Babb to leave the range. I was there at the time spoken of, and there was nothing said about staying on the range. I don't know what time they started for New Mexico. We furnished the horses to collect and hold the cattle; we did not get them from Babb and got none from him while I worked there.

20 The plaintiff then introduced in evidence the deposition of Andrew Young, which deposition is in the words and figures following, to wit:

ANDREW YOUNG witness for plaintiff, a citizen of Coleman county, Texas, deposes and says:

I have known Mr. W. B. Crabtree for about three years. I have known W. M. Babb about eight years. I know that Crabtree controlled the cattle in the Babb brands; that he cut them in the various round-ups in the neighborhood during the time above mentioned and sold them; that at the time I was in the cattle business, and was at the various round-ups in the neighborhood, and from my own observation I saw Crabtree cut out and control the said brand at the various round-ups. I lived about four miles from Babb's and about ten or eleven miles from Crabtree's at that time. Crabtree afterwards drove the cattle from where then located to the Salt Fork of the Brazos river. I saw one herd of the cattle driven off by Crabtree; I think it was about 150 miles from where the cattle were started to the South Fork of the Brazos. I think there were about 220 or 240 head of the cattle in the herd I saw; I don't know that they were all in the Babb brands; the Babb brands are

J O M, W M & O o. I reckon there were other brands, but I don't remember them. Crabtree was hunting said cattle one season before he moved them off, and may have moved them the same fall that he controlled them the spring and summer preceding; I am not positive. During the summer Mr. Crabtree controlled the Babb brands. My outfit and Mr. Crabtree's hunted and drove cattle together. During the same season Mr. Babb nor none of his outfit claimed or controlled the said cattle, so far as I know. Since Mr. Crabtree first took possession of the cattle Mr. Babb has another or new brand that he claimed to control and own.

Crossed by defendant:

I don't remember to have seen the new brands, B I L and B A B, until after Crabtree took control of the cattle; that during the
21 season that Crabtree controlled the cattle the J O & M brands were kept upon the cattle; that was the holding brand. Babb was the owner of the J O & M brand; I don't know whether he ever transferred it or not. Crabtree controlled and gathered the brand one season, as stated above. A man may control and manage stock without being the owner of them; that is the custom among stock men. There were other parties hunting and controlling said cattle, claiming to be working for Crabtree. Some of the horses used by Crabtree in hunting the cattle the season before mentioned were in the J O M brand. I don't know who furnished the provisions, but Crabtree paid me part of the cook hire.

Redirect:

Question by the PLAINTIFFS: Who owned the cattle during the time Crabtree controlled them?

He answered: I don't know.

(Signed) ANDY YOUNG.

The plaintiff then introduced in evidence the deposition of W. L. Gilliland; which deposition was and is in the words and figures as follows, to wit:

W. I. GILLILAND, a citizen of Callahan county, Texas, being duly sworn, deposes and says:

I have known Mr. Crabtree about four years, and Mr. Babb about eight years. In the years 1880 and 1881 Mr. Crabtree gathered and drove herds of the Babb brands of cattle, one herd in the fall and one in the spring or summer following, I think. I was with Crabtree a time or two while he was gathering the cattle. He gathered them as his own cattle. He gathered and held the cattle about a mile and a half from Mr. Babb's. I saw the herd there one time during the time he was gathering them. I was a cattle man at the time and hunted cattle in the same range during that time.

Crossed by DEFENDANT: Up to the time Crabtree was controlling the cattle Mr. Babb owned the brands and said cattle that he
22 controlled. I don't know whether Mr. Babb sold the brand or not. He, Mr. Crabtree, might have exercised control over

the cattle, and them — still Mr. Babb's. I don't know anything about that. Some of the horses used by Crabtree in gathering the cattle the season spoken of were in the Babb brand. I don't know who owned them at the time. I don't know whether or not the marks and brands of the cattle were changed before they were driven off.

Redirect:

It is not customary for men in the possession or control of cattle in this country to claim them as their own unless they own them.

W. L. GILLILAND.

The plaintiff then introduced in evidence the deposition of G. N. Gray; which deposition was and is in the words and figures as follows, to wit:

G. N. GRAY, a resident citizen of Coleman county, Texas, a witness for plaintiffs, being duly sworn deposes and says:

I have known Messrs. Babb and Crabtree about (5) five years, and lived in the neighborhood where they lived. I know that Mr. Crabtree controlled and gathered the Babb brands of cattle about two or three years ago. I saw Mr. Crabtree gathering the cattle, but I never saw him drive off the cattle out of the range.

Crossed by DEFENDANT: The Babb brand of horses was used by Crabtree principally in gathering the cattle. No brands were changed, as far as I know, before the cattle were taken away. The cattle might have been controlled by Crabtree as they were, and the title or ownership still have been in Mr. Babb.

G. M. GRAY.

The defendants, in support of their case, then introduced the following testimony, to wit:

W. I. BABB, being duly sworn, testified as follows:

23 I am a cousin of Crabtree. I live in Coleman county, Texas. I am a son of W. M. Babb. In 1879 I contracted my cattle to Crabtree. I sold the cattle with the understanding that he should pay for them. The title was to be in me until the cattle were paid for. He was to pay seven dollars per head for them. Crabtree was to collect and count the cattle. I did not go with him on the range and count and deliver them. The note was not given at the time the trade was made. It was near the time of payment. I say, I would like to have some money; he said he had no money, and said he must give me a note, and I could not get the money from my father, and that if he did not pay the note the cattle were to go to my father. I sold him four horses at $25 per head, and two of them were turned over to Segrist. He then said if he failed to pay that I should not charge him for the use of the horses. My brands were WHIT and H. B. W. H. I. T. was to be continued on the cattle. I gave him permission to sell some old cows if he would replace them with young ones. I was present at a contract between Crabtree and

my father. I went to plaintiff and asked him about the contract. He, plaintiff, said father proposed to sell the cattle on time in case plaintiff can pay for them. I then went to see my father. He said, sell for $1,600 if he would pay for them. Father agreed to sell for $1,600, and if plaintiff failed to pay either note when due the cattle were to remain father's. Plaintiff bought horses on the same condition, and if stock fell back no charge was to be made for the use of the horses. Father furnished horses and provisions to collect the cattle. Plaintiff had cattle of his own. The cattle were to be kept on the same range, and the J O & M brand was to be kept up. The title was to remain in father and the cattle were to be his if not paid for at the time the notes fell due. Crabtree said he must have something to collect the stock with, and must have a bill of sale or power of attorney, and father said he would give bill of sale; it
24 would be better than power of attorney, but it was not to pass his title. I returned notes in June. He was in the court-room; I called him and gave him the notes and said, This is the first time I have seen you since you got the cattle and now give you the notes. He said, That's all right, and then put them in his pocket and walked off. I and Norrell came after the cattle to New Mexico. I came for my father. Mr. Norrell and I only went to Carter's the first time; went to the dug-out and went in. Billy Carter was on the outside. He went in and was introduced to Norrell. Carter said, Have been looking for you for some time. I said, I am here and want a settlement. He said, I have not the money and will have to turn you over the stock. I eat with him and he said he was a little short. I said I would help him if he could get horses. He said there were some horses he would have to turn over, and he would get them. He went and got the horses. He gave me two. I then went to camp to come back next day and round-up. It snowed next day. Segrist and Norrell helped. Two or three days afterwards Segrist and Norrell went on the round-up. I went to the camp of Carter and they were not ready, but got up their horses and went with us and helped to cut out the cattle. We cut out about 326 head of cattle. We only cut out cattle of the BAB brand. The Carters turned me over 7 head of horses. Crabtree got them from me and my father. They were worth $25 or $30 per head. For the cattle and horses I got $4,700. That, I think, was a fair market price. I left other cattle with the Carters. I left about 150 or 200 head, more or less, with the Carters. I said to Carter that I did not want anything except what was in those brands. He said certainly not, and then we cut them out—he and I. There was nothing in the portion I took but what was in the Babb brands. If they had O D they had the others. I did not notice O D. I
25 never saw any with H M brand, nor did I take any with O D brand.

Cross-examination:

Had no cattle dealings with Carter; he turned me over the Babb brands and my brands, and I left Carter's brand of cattle and the O D brand of cattle. I saw O D brand there, but did not

count them. I took the cattle the last of January. Segrist and Carter were there. I sold the cattle to Segrist. Crabtree had been using the brand of Babb a year and a half; that brand was to be kept upon the cattle; he was only to keep the brand upon these cattle. I don't know whether he branded cattle—other cattle—with this brand; don't suppose he did; don't know of his branding cattle bought from others in that brand of my father's. I did not see him brand any cattle in father's brand. I do not know what cattle he rounded up. I was not present when the bill of sale was given. I swear I did not give plaintiff any note and bill of sale on the same sheet of paper; there was no paper in writing attached; there might have been some blank paper; the papers were not folded together; I handed them all to him at the same time; they were all together. I said, This is the first time I have had an opportunity to give them to you. My father furnished supplies—bacon, and flour; I am sure he furnished flour two or three times; I saw him furnish shoulders and sides; he bought the supplies, and paid for them. Crabtree said that he must have supplies, and father said go and get them; Crabtree said that if father would get them that he would pay for them; I don't think that father said that he would furnish supplies, and that afterwards Carter went and got them. I did not say that I took the cattle. Carter turned me over all the cattle. When I said I wanted a settlement I meant about the cattle. I don't think I took a cow with a bell on her; I know that if she had the Babb brand on I took her; if she didn't I didn't take her. I had not sold the cattle when they were cut out. I
26 asked Mr. Segrist to help me when Carter said he was short of help. I sold them afterwards. I did not close the sale the day they were cut out. I never asked the Carters if they were going to help me cut out the cattle. They did not say, We told you we couldn't turn over those cattle. I had no conversation with the other Carters in J. E. Crabtree's presence. I am positive that they did not tell me that they could not turn the cattle over. I don't know how they managed the cattle for Crabtree. *I don't know how they managed the cattle for Crabtree.* I don't know how many cattle Crabtree had before he bought from me; he had 75 or 80 of my knowledge; don't know if he sold them before he bought from me. The note given by Crabtree covered the horses—four of them at $25 per head; two were branded J O & M; the others were Mexican brands. $25 was the agreed price. I never was on the prairie with Crabtree when he made a partial count of the cattle; we might have looked at the cattle around the ranch, but not to count them. I don't remember any WHIT brand of cattle being cut out of my father's cattle. I turned over 15 or 20 of the WHIT brand. I turned over myself 00 00 22 head for work in 1879. I saw some $\overline{O\ D}$ brand of cattle. I know these were $\overline{O\ D}$ brand of cattle. I did not see any $\overline{O\ D}$ with the J O M brand; did not see any $\overline{O\ D}$ with the WHIT brand. Before I rode off on horseback from my father's the terms of the contract had been agreed upon. I made a memorandum of the papers I turned over to Crabtree. I took the cattle

with the WHIT brand independent of any other brands. I did not have these brands rounded up.

—— McGONIGLE, being duly sworn, testified as follows, to wit:

I was present at the time of the giving up of the notes by W. I. Babb to Crabtree; I examined them; there might have been
27 a blank paper, but no bill of sale attached. Babb said, "Bill, this is the first opportunity I have had of giving you your notes." Crabtree took them and said, "All right."

T. J. NORRELL, being duly sworn, testified as follows:

Live in Callahan county, Texas; was present when young Babb received the cattle from Carter; was acting for Babb in this matter. On the last day of June, 1882, I arrived at Carter's ranch; found William Carter at the ranch; young Babb was with me. Babb spoke to Carter and said, "I guess you know what my business is." Carter said, I have been looking for you for some time. Babb said then, I have come for a settlement, and Carter replied, I have not got the money. Carter and Babb got on the mules of Segrist and drove up six or seven head of horses which were roped at the corral to be used in rounding up the cattle the next day, but owing to a snow-storm we were delayed two or three days. As soon as the weather permitted we commenced to round up on the outside of the range. Babb started toward the ranch of Carter to tell him. Carter, Babb, Segrist, and two or three others, I think, were present when we cut the cattle, and nothing but cattle having the Babb brand was cut by us. I have a memorandum of the brands cut by us as Babb's brands; the J O M brand was the principal one, WHIT another, C7, and others. The way I understood it was, by mutual consent we took the cattle. There was no bell cow taken. On the second or third day after we cut out the cattle they were sold to Segrist for $4,750.00 by young Babb; this was a fair price for this stock. Three of the horses were very good horses; the others com-
mon horses. The three best were worth $40 or $45 each;
28 others $20 or $25 each. I know nothing about the trade between Crabtree and Babb. My recollection is, there were 326 head of cattle turned over to Segrist by Babb.

W. P. SEGRIST, being duly sworn, testified as follows:

I am one of the defendants in this suit. I live in Lincoln county, N. M., about 233 miles from here. I know the place where young Babb took the cattle from Crabtree; it is about six miles from my house; was there with them when the cattle were cut out. I helped hold the herd; Babb and Carter cut out the cattle. I did not examine the cattle only that day; did not get any $\overline{O\ D}$ or T—B. I got 326 head of cattle and seven horses, and paid $4,750.00 to Babb for them. I saw Carter before that time; had no talk with Carter about the ownership of the cattle. Bill Carter offered to sell cattle at different times. One bell cow was left with Carter; we did not take it. I know few of the brands left with Carter. U B was the

principle brand cut back; several T—B brands and two red steers in O D brand. I am certain there were two O D.

Cross-examination:

I did not examine old brands on the cattle that had J O M or WHIT brands on them; all I looked for was to see the J O M or WHIT on them. The U B brand belongs to Carter; T B don't belong to them. We took all the cattle in the WHIT brand.

J. H. CARTER, being recalled, testified as follows:

The bell cow had the HV on her. I saw this cow the day we started back with the cattle of Segrist; this was some ten or twelve days after they were taken. There was only 8 head left of Crabtree's cattle with us.

The defendant then introduced in evidence deposition of
29 W. M. Babb; which deposition was and is in the words and figures as follows, to wit:

W. M. BABB, a citizen of Coleman county, Texas, being duly sworn for defendant, on oath states:

I think I have known Mr. Crabtree about 12 years. I have seen Mr. Segrist once. In July, 1880 (to the best of my knowledge), I sold the brands of cattle in question to Mr. Crabtree, and if they were not paid for by about September of the same year, though I am not positive as to the year, they were to be mine. I sold the horses to Mr. Crabtree on the same conditions as I sold him the cattle. I sold him the horses after I had sold him the cattle in order that he might be enabled to gather and properly take care of the cattle. He was to make first payment on the cattle about the first of September, as before stated, and if he failed to make first payment the cattle and horses were to be my property as before. I understood that Crabtree had stock of his own on the range, which he gathered with my horses. I think I furnished most of the supplies used by Crabtree while gathering the stock. He has never paid me anything whatever for the cattle, horses, or supplies. It was understood by and between myself and Crabtree that he was not to sell any of the stock unless the proceeds of the same was paid to me. He never did turn over to me the proceeds of the sale of any of said stock. In the original sale of the stock by me J. E. & W. B. Crabtree were equally interested in the purchase. I heard that they were about to sell some of the stock and I went to one of them and told him that they must not sell any of the said stock, and he denied it; the stock was to be held by the Crabtrees on their old range until paid for by them. I gave them permission to move the first herd to the Salt Fork of the Brazos, but I did not give them permission to move the last herd. The last herd was driven to my ranch in Callahan
county, a few miles from the old ranch. I knew nothing of
30 their being moved from there to Salt Fork, and the first I knew of them having been moved was when a runner came and told me that they had been moved in the direction of New

Mexico. I believed that they were going to move the stock to the Salt Fork, but without my permission. After the maturity of the first note I did not give them permission to move the stock, but persistently refused to do so. I sent first to the Salt Fork and learned that the stock had been moved from there by the Crabtrees, then sent W. I. Babb and T. J. Norrell to New Mexico, and gave them power of attorney to handle my stock—I mean the stock carried by the Messrs. Crabtree. I don't claim anything from the Messrs. Crabtree under or by the sale of the stock. I took the stock back in accordance with the agreement between us.

Crossed by PLAINTIFFS: I made a bill of sale to the Crabtrees for the stock. I don't think there are any witnesses to it. There was no reservation of title in the bill of sale. There were two notes executed for the purchase-money of the cattle—one was due September following the trade; the other one year after the first was due. I turned the notes over to my son when I sent him to New Mexico to see about my cattle that was took from me, and after his return home he gave the notes back to me and I again gave them to my son today. I gave my son power of attorney to take possession of my cattle. How he got possession of them I don't know of my own knowledge. A little over a year ago I got between 3,000 and 4,000 dollars on purchase-money of said cattle. My son told me he had sold my cattle to Mr. R. P. Segrist, one of the defendants in the suit. I think there is some due yet, but don't know how much. I have never paid the hands for work done for Crabtree. In handling my stock I authorized my son by power of attorney to take possession of my stock that Messrs. Crabtree had run off. I was
31 not present when my son got possession of my stock in New Mexico, but was in Texas at that time.

Redirect:

I gave the bill of sale to the stock because it was as easy to give as to give power of attorney, and Messrs. Crabtree would have had no right to handle the stock which they might find estrayed without a bill of sale or power of attorney. There were several witnesses called to witness the fact that the cattle were to remain mine until paid for.

(Signed) W. M. BABB.

The defendants then introduced in evidence the deposition of J. E. Shipman, which deposition was and is in the words and figures following, to wit:

J. E. SHIPMAN, witness for defendants, a citizen of Callahan county, Texas, being sworn, on oath says:

I have known Messrs. Babb and Crabtree for a number of years. Mr. Crabtree had a few cattle of his own, and told me that he wanted to buy the remnant of cattle owned by Mr. Babb, and asked me to help him, and he went on a cow hunt, and when he returned he told me he had seen Mr. Babb and had bought the cattle, and that he was to pay $1,600.00 for them, in two payments. At the time he

told me that he had bought the cattle he told me that he had permission to sell off the old cows and steers, and the proceeds of same were to be applied toward the payment of the purchase-money, and that all the cattle were to stand good for the purchase-money. He said he was to pay $800.00 September, 1881, then $800.00 a year from that date, and if he did not come up to his contract at that time that he, Crabtree, was to lose his labor, and that the cattle were to fall back to Mr. Babb. He said that if he did not come up to his part of the contract the cattle were to fall back to Mr.
32 Babb; he did not say anything about the first or last note. In the fall of 1880 or 1881 Mr. Crabtree drove one herd of the cattle off, and drove one herd in the spring or summer following. Mr. Crabtree told me that he got permission from Mr. Babb to drive the first herd, the same being composed principally of young cattle, to the Salt Fork of the Brazos to his brother-in-law's. In gathering the cattle in question Mr. Crabtree used principally Mr. Babb's horses; he got provisions from Mr. Babb to be used by him, Crabtree, in hunting and gathering said cattle, and so far as I know he did not pay for it. Mr. Crabtree was running the J O & M brand of cattle during the time mentioned, and that he changed the marks of what cattle I saw; I don't know that he changed the marks of all of them. I did not see Mr. Babb or any of his hands have anything to do with the cattle during the season he was gathering them; that previous to the last sale made by W. I. Babb to Messrs. Crabtree W. I. Babb had sold something over ($500) five hundred dollars' worth of cattle to said Crabtrees on the same terms as the last sale was made on and transferred the note for the cattle to W. H. Babb, his father. The two sales were made on the same conditions.

Crossed by plaintiffs:

The cattle that they got from W. M. Babb, except two or three head, were taken off with the others to the Salt Fork of the Brazos. I heard Mr. W. I. Babb say that he got a portion of the cattle he sold them when he got possession of the other cattle in New Mexico. I think there were 40 or 50 head of the cattle sold by W. I. Babb to the Messrs. Crabtree; I don't know the exact number. When Mr. Crabtree was gathering the cattle he used Babb's horses. Some time after he gathered the first herd he bought three or four head of the horses he had been using, and he told me he had bought them on time.

J. E. SHIPMAN.

33 The defendant then introduced in evidence the deposition of W. Thomas Babb, which deposition was and is in the words and figures as follows, to wit:

W. Thomas Babb, a resident citizen of Callahan county, Texas, witness for defendants, being duly sworn, on oath says:

I have known Mr. Crabtree and Mr. W. M. Babb a long while. W. M. Babb is my uncle. I have heard of the sale of the cattle, but was not present when the trade was made. I heard Mr. Crab-

tree say he had bought the cattle, and that if he did not pay off the notes he had given for the cattle that they were to go back to Mr. Babb, and that if the cattle did go back to Mr. Babb that he, Crabtree, was to lose his labor. The stock were gathered by Mr. Crabtree with horses bought by Mr. Crabtree from Mr. Babb upon the same terms as the cattle. Mr. Crabtree had some cattle of his own.

W. T. BABB.

The defendant then introduced in evidence the deposition of D. S. Babb, which deposition was and is in the words and figures as follows, to wit:

D. S. BABB, a citizen of Coleman county, Texas, a witness for defendants, being duly sworn, on oath says:

I have known Mr. Crabtree about 9 years. I am a son of W. M. Babb, and I don't know Mr. Segrist; that in August, 1881, Mr. Crabtree came to me and told me that the first note he had given to W. M. Babb for the purchase of the cattle was nearly due; that it would be due in September following, and that he wanted me to go to see Mr. Babb and get him to extend the time on the first note, and also stated that the second note would be due in September, 1882, and that upon his failure to pay the first note that the cattle were to go back to Mr. Babb. I went to see my father, W. M. Babb, as
34 requested, but he did not agree to extend the time. He told me that if father closed down on him it would leave him without a dollar in the world. I saw men who claimed to be working for Crabtree the season before using the J O & M brand of horses, and I understood they had been bought by Crabtree on the same terms upon which the cattle had been bought. He told me that the cattle were to be kept in their old range, but he had gotten permission from my father to move the young cattle to Carter's ranch on the Salt Fork of the Brazos. So far as I know, none of the marks and brands were changed before they were driven away from there.

Crossed by plaintiffs:

I had some opportunities to know whether the cattle were remarked and branded or not. It was after he had driven the first herd of catttle to the Salt Fork of the Brazos that he had the conversation with me and requested me to go and see my father to get extension of time. He had some few cattle in the O. D. brand; I don't know how many he had.

DAVID S. BABB.

The foregoing is all the testimony introduced on the trial of this cause; and, both parties having rested, the plaintiff asked the court to instruct the jury as follows:

1. If the jury find, from the evidence, that the plaintiff Crabtree bought part of the cattle in dispute from one W. M. Babb, and that the contract of purchase was put in writing containing the terms of agreement, then they are bound by what is written, whether signed or not, and they are not allowed to say there was a mistake in the

writing and they intended to agree to something different from the contents of the writing, for the very object of putting the
35 agreement in writing is to prevent disputes about what they intended, and it will be looked upon to contain all that the parties intended should form any part of their bargain, and everything said respecting the transaction in the previous conversation and not incorporated into the written agreement will be considered as intentionally rejected.

2. If the jury find, from the evidence, that the cattle and horses in question belonged to the plaintiff Crabtree and the same came into the possession of the defendant without the consent or authority of the plaintiff, and that the defendants converted them to their own use, you will find for the plaintiff and assess his damages at the value of the property at the time of taking and converting the same, with interest.

3. If you find, from the evidence, that the plaintiff or the plaintiff and his brother purchased the cattle from W. M. Babb or W. T. Babb, and that he or they gave their promissory notes in payment therefor and the same was accepted by the Babbs, although the notes were taken only as conditional payments, yet they would be *prima facie* evidence of payment, and the said Babbs, whilst holding said notes, could not proceed to take possession of the said cattle and horses as their own. Their remedy would be upon the notes or to cancel the trade; and if you find, from the evidence, that said Babbs did, under the circumstances just mentioned, take possession of said cattle without authority of the plaintiff and dispose of them to the defendants, you will find for the plaintiff the value of the cattle and horses at the time of taking the same, with interest.

4. If you find, from the evidence, that the plaintiff purchased a portion of the cattle in dispute from W. M. Babb, and that he, the said W. M. Babb, executed and delivered a bill of sale for the same, and that the cattle was at the time scattered on the range, and it being inconvenient or impossible for a manual de-
36 livery, the bill of sale would be an actual delivery whenever found; and if, at the time of the delivery of the bill of sale, said Babb accepted said Crabtree's notes, payable in one and two years, the said notes would be a payment therefor, and the said vendors would have to look to their notes for payment.

5. If the jury find, from the evidence, that W. T. Babb at a time sold to plaintiff the cattle or any of them in the WHIT brand, and that the sale was on a credit, with conditions and reservations, and that subsequent thereto the plaintiff executed and delivered to said W. T. Babb his note in payment therefor, which note was accepted by said W. T. Babb, the acceptance of this note by W. T. Babb on account of this prior indebtedness is *prima facie* a satisfaction of said debt and discharge of said conditions and reservations.

All of which said instructions except the first were given by the court, and to the giving of instruction numbered two the defendant then and there objected for the following reasons: That the same misstates the law; that it is not supported by the law and the evidence; that it is inconsistent with other instructions given, and that

it is calculated to mislead and deceive the jury; which said objection was overruled by the court and said instruction given; to which ruling of the court the defendants then and there excepted.

To the giving of instruction numbered three the defendants then and there objected for the following reasons: That the same misstates the law; that it is not supported by the law and the evidence; that it is inconsistent with other instructions given, and that it is calculated to mislead and deceive the jury; which said objection was overruled by the court and said instruction was given; to which ruling of the court the said defendants then and there excepted.

37 To the giving of the instruction numbered four the defendants then and there objected for the following reasons: That the same misstates the law; that it is not supported by the law and the evidence; that it is inconsistent with other instructions given, and that it is calculated to mislead and deceive the jury; which said objection was overruled by the court and said instruction was given; to which ruling of the court the defendants — and there excepted.

To the giving of instruction numbered five the defendants then and there objected for the following reasons: That the same misstates the law; that it is not supported by the law and evidence; that it is inconsistent with other instructions given, and that it is calculated to mislead and deceive the jury; which said objection was overruled by the court and said instruction was given; to which ruling of the court the defendants then and there excepted.

The defendants then asked the court to instruct the jury as follows:

1. If the jury believe, from the evidence, that the cattle in question were agreed to be sold to plaintiff, part by W. M. Babb and part by W. I. Babb, and that in accordance therewith plaintiff was to collect and hold them on the range, keep up the brands, and not sell or move them without permission of Babb, and that the title was to remain in the Babbs until they were paid for by defendants, and that unless the notes given for them were paid the cattle were to remain the property of Babb, and that the bill of sale was given simply to enable defendants to gather the cattle, and if the jury further believe that the notes were not paid at maturity and have not since been paid, but have been surrendered to plaintiff and accepted by him, then there was no sale of the cattle such as would prevent Babb from retaking possession of the cattle and selling them

38 to Segrist or any one else; in which event the jury should find for the defendants.

2. If the jury believe, from the evidence, that the title to the cattle remained in Babb until the notes were paid, and that said notes were not paid at maturity or at any time since, then Babb had a right to retake the cattle and sell them to others, and if he did so and sold them to Segrist the jury should find defendants not guilty.

3. If the jury believe, from the evidence, that the bill of sale in evidence was not given to pass the absolute title, but simply to enable plaintiff to gather the cattle with, and that it was agreed that the cattle were to remain as property of Babb until paid for

according to the terms of the notes, and that the bill of sale was not a consummation of the contract, but merely a circumstance put into the contract so as to gather the cattle, it must not be considered as transferring the title of the cattle.

4. If the jury believe, from the evidence, that plaintiff did not have absolute title to the cattle in question and that, contrary to the agreement with Babb, he moved them from their range to New Mexico, and that plaintiff had, in accordance with the agreement, failed to pay either of the said notes when due, then Babb had the right to retake the cattle and sell them, and in that case the jury should find the defendants not guilty.

5. If the jury believe, from the evidence, that the plaintiff agreed to purchase the cattle and was to retain them on the range and keep up the brands, and that the title of the cattle remained in Babb, and that after default of one of the notes Babb had the right to retake the cattle, and that plaintiff branded other cattle with the same brands and mixed them in with the herd so that they could not be distinguished from the Babb cattle, then Babb would have the right to take all the cattle he could not distinguish and sell them, he being reponsible therefor to plaintiff.

39 6. If the jury believe, from the evidence, that the Carters were in charge of the cattle in question, and that they were the agents of plaintiff with reference to said cattle, and had the right to settle any claims with reference to them, and that they turned over said cattle to settle the claims of the Babbs, then the jury should find for the defendants.

7. A promissory note is never considered as payment unless it is taken absolutely as payment; if there be any agreement that a note is not to be considered payment if unpaid at maturity, then it is no payment; but the payment of the note only will be the payment of the original claim, and in such case the original contract will remain independent of the notes.

8. If the jury believe, from the evidence, that the cattle in question were liable for the payment of the notes, and that plaintiff, contrary to his agreements, removed them from Texas and did not pay the notes, and that when the notes fell due and Babb applied to the agent of the plaintiff in charge of the cattle for a settlement, that that agent voluntarily turned over the cattle, then you must find for the defendants.

The court gave all the instructions asked for by defendants with the exception of the instruction numbered one; to which refusal of the court the said defendants then and there excepted.

The court then, of its own motion, charged the jury as follows:

GENTLEMEN OF THE JURY: The facts to be found from the evidence by you are, principally—

First. Who was the owner of the stock taken from the Carters by Babb?

Second. What was the value of said stock?

If you find that the stock was the property of plaintiff Crabtree you will find a verdict in his favor for the value of the cattle,

40 with interest from the time Babb took possession of them, at the rate of six per cent.

If, however, you believe from the evidence that the stock delivered to Babb or taken by him from Carter belonged to him or to him and his father or either of them, you will find a verdict for defendant. Unless you find from the evidence that Carter was the agent of Crabtree for the purpose of selling or disposing of his cattle, any delivery by him to Babb would not bind Crabtree.

The court also instructs you that a bargain and sale of personal property, accompanied by delivery, divests the vendor of any lien for payment, unless such lien is secured by chattel mortgage or by agreement between the parties.

If you find from the evidence that Babb sold and delivered the stock on the range and took promissory notes in payment, this would be an absolute, unconditional sale and Babb could not retake stock. Babb's remedy in such case would be by suit to collect what might be due him upon said notes.

Should you find from the evidence that Carter had authority from Crabtree to settle his debts and to sell and dispose of his cattle, and you also find that he delivered said band of cattle in payment of said notes, and was authorized to do so, you will find for defendants.

This contention is one of fact rather than law. The dispute arises as to the true character of an agreement.

The agreement is just what the parties intended to make it. What did the parties intend when they made the agreement? Did not the Babbs intend to get some twenty-one or twenty-two hundred dollars and Crabtree intend to get a band of cattle? Did the Babbs intend to reserve a vendor's lien for this sum of money? This they could do by an agreement to that effect. If you believe

41 from the evidence that there was an agreement that upon failure to pay for these cattle the Babbs might take them whenever they found them, you would be justified in finding defendants not guilty; but if you find that Babbs simply had a vendor's lien for the purchase-money, then they could not enforce the lien in this way, and you must find for plaintiff.

If they seek to enforce a vendor's lien it should be done in court, so that the surplus, if there was any, might be properly distributed. If your verdict is for defendants it will be not guilty; if for plaintiff you will find the value of the cattle, with interest on the sum from the time they were taken. The cattle were found in this Territory, and the suit is properly brought here.

To the giving of which charge the defendants then and there objected for the reason that the same misstates the law; that it is not supported by the law and the evidence; that it is contradictory to other instructions given, and that it is calculated to mislead and deceive the jury; which said objection was overruled by the court, and said charge was given; to which ruling of the court the defendants then and there excepted.

The cause then having been submitted to the jury, the jury found for the plaintiff, and assessed his damage in the sum of $6,633.04;

whereupon the defendants filed *his* motion for a new trial; which said motion was and is in the words and figures following, to wit:

TERRITORY OF NEW MEXICO, *County of San Miguel:*

In the District Court, First Judicial District.

WILLIAM B. CRABTREE, Plaintiff,
against
REUBEN P. SEGRIST *et al.*

Now, at this day, come the defendants in the above-entitled cause and move the court to set aside the verdict rendered therein,
42 and to grant them a new trial for the following reasons:

First. Because the verdict is against the evidence, and because there is an entire failure of evidence upon material points necessary to be proven.

Second. Because the court erred in admitting improper evidence offered by plaintiff and objected to by defendants and refusing proper evidence offered by defendants.

Third. Because the court erred in refusing proper instructions offered by defendants and used improper instructions asked by plaintiff and objected to by defendants.

Fourth. Because the judge erred in his charge to the jury and misstated the law and so shaped his charge that it was calculated to mislead the jury and did mislead them, because the damages are excessive.

CATRON, THORNTON & CLANCY,
Attorneys for Defendants.

And afterwards, to wit, on the 7th day of said term, the same being the 11th day of August, 1884, said motion coming on to be heard, the same was by the court overruled.

And the foregoing matters not being matters of record in said cause, the defendants pray the court that this their bill of exceptions containing the same may be signed, sealed, and made a part of the record in said cause, which is accordingly done this first of December, 1884.

S. B. AXTELL,
Chief Justice, &c.

And I do further certify that the foregoing record contains the pleadings in said cause and so much of the proceedings as are material and necessary for the review of said cause in the supreme court of the Territory of New Mexico.

S. B. AXTELL,
Chief Justice, &c.

The said plaintiff hereby agrees that the foregoing proposed record and bill of exceptions are sufficient and correct, and consents that the same may be signed by the judge of said district court.

LEE & FORT,
Attorneys for Plaintiff.

TERRITORY OF NEW MEXICO, *County of San Miguel:*

I, clerk of the first judicial district court of said Territory within and for said county, certify that the foregoing twenty-two pages contain a full, true, and perfect transcript of the record as agreed upon in the case lately pending, wherein William B. Crabtree was plaintiff and Reuben P. Segrist *et al.* were defendants, as the same are of record in my office.

Witness my hand and the seal of said court this 9th day of December, 1884.

[SEAL.] C. M. PHILLIPS, *Clerk.*

44 And afterwards, to wit, on the 13th day of January, 1885, there was filed in the clerk's office of said supreme court the said appellants' assignment of errors; which said assignment of errors *which said assignment of errors* is in the words and figures following, to wit:

Assignment of Errors.

In the Supreme Court, Territory of New Mexico. January Term, 1885.

WILLIAM B. CRABTREE, Appellee,

vs.

REUBEN P. SEGRIST *et al.*, Appellants.

Now come said appellants, by their attorneys, and say that there is manifest error in the record and proceedings in this cause, in this—

1. There is no evidence to sustain any verdict against any defendant other than Segrist.

2. There is no evidence to show any demand upon any of the defendants for the return of the property before suit was begun.

3. The court erred in instructing the jury that if they found "from the evidence that the plaintiff or the plaintiff and his brother purchased the cattle from W. M. Babb or W. T. Babb, and that
45 he or they gave their promissory notes in payment therefor, and the same was accepted by the Babbs, although the notes were taken only as conditional payments, yet they would be *prima facie* evidence of payment, and the Babbs whilst holding said notes could not proceed to take possession of the said cattle and horses as their own; their remedy would be upon the notes or to cancel the trade; and if you find from the evidence that said Babbs

did, under the circumstances just mentioned, take possession of said cattle without authority of the plaintiff and dispose of them to the defendants you will find for the plaintiff the value of the cattle and horses at the time of taking the same, with interest." (Page 34 of record.)

4. The court erred in instructing the jury that if they found "from the evidence that the plaintiff purchased a portion of the cattle in dispute from W. M. Babb, and that he, the said W. M. Babb, executed and delivered a bill of sale for the same, and that the cattle was at the time scattered on the range, and it being inconvenient or impossible for a manual delivery, the bill of sale would be an
46 actual delivery whenever found, and if at the time of the delivery of the bill of sale said Babb accepted said Crabtree's notes, payable in one and two years, the said notes would be a payment therefor, and the said vendors would have to look to their notes for payment." (Pages 34–'5 of record.)

5. The court erred in instructing the jury that if they found "from the evidence that W. T. Babb at a time sold to plaintiff the cattle or any of them in the W H I T brand, and that the sale was on a credit with conditions and reservations, and that subsequent thereto the plaintiff executed and delivered to said W. T. Babb his note in payment therefor, which note was accepted by said W. T. Babb, the acceptance of this note by W. T. Babb on account of this prior indebtedness is, *prima facie*, a satisfaction of said debt and discharge of said conditions and reservations." (Page 35 of record.)

6. The court erred in refusing to instruct the jury that if they believed "from the evidence that the cattle in question were agreed to be sold to plaintiff, part by W. M. Babb and part by W. I.
47 Babb, and that in accordance therewith plaintiff was to collect and hold them on the range, keep up the brands, and not sell or move them without permission of Babb, and that the title was to remain in the Babbs until they were paid for defendant, and that unless the notes given for them were paid the cattle were to remain the property of Babb, and that the bill of sale was given simply to enable defendant to gather the cattle; and if the jury further believe that the notes were not paid at maturity and have not since been paid, but have been surrendered to plaintiff and accepted by him, then there was no sale of the cattle such as would prevent Babb from retaking possession of the cattle and selling them to Segrist or any one else, in which event the jury should find for the defendants." (Record, pages 36–'7.)

7. The court erred in denying the motion for a new trial.

Wherefore said appellants pray that the judgment in this cause be reversed, annulled, set aside, and altogether held for nothing, and that this cause be remanded to the court below, with directions to award a new trial.

48 CATRON, THORNTON & CLANCY,
Counsel for Appellants.

On which said assignment of errors is the following endorsement, to wit:

William B. Crabtree, appellee, *vs.* Reuben P. Segrist *et al.*, appellants. Assignment of errors. Filed in my office this 13th day of January, 1885. C. M. Phillips, clerk.

And be it further remembered that on Monday, the fifth day of January, 1885, being the first day of the regular January, 1885, term of the supreme court of the Territory of New Mexico, the following, among other, proceedings were had, to wit:

Appearance and Order Setting for Argument.

WILLIAM B. CRABTREE, Appellee,
vs.
REUBEN P. SEGRIST *et al.*, Appellants. } 213.

Appeal from first district.

49 Now comes said plaintiff and appellee, by his attorneys, Messrs. Lee and Fort, and enters his appearance herein, and thereupon it is ordered that this cause be, and hereby is, set for argument at the incoming of court on the second Saturday of this term.

And be it further remembered that on Saturday, January 24th, 1885, being the eighteenth day of said term of said supreme court, the following, among other, proceedings were had, to wit:

Record Entry of Submission.

WILLIAM B. CRABTREE, Appellee,
vs.
REUBEN P. SEGRIST *et al.*, Appellants. } 213.

Appeal from first judicial district, San Miguel county.

By agreement of said parties, by their respective attorneys, this cause is now submitted to the court upon the briefs, assignment of errors, and record filed herein, and the court, not being sufficiently advised in the premises, takes the same under advisement.

50 And be it further remembered that on Friday, May 1st, 1885, being the twenty-fifth day of said term of said supreme court, the following, among other, proceedings were had, to wit:

Appeal from First Judicial District, San Miguel County.

WILLIAM B. CRABTREE, Appellee,
vs.
REUBEN P. SEGRIST *et al.*, Appellants. } 213.

This cause having been argued by counsel and submitted to and taken under advisement by the court on a former day of the present term, the court being sufficiently advised in the premises, announces its decision in accordance with the opinion of the late Associate Justice Bell, filed herein, on March 14, 1885, affirming the judg-

ment of the court below for reasons set forth in said opinion, Associate Justice Wilson concurring, it is therefore considered and adjudged by the court that the judgment in this cause of the first judicial district court within and for the county of San Miguel, whence this cause came into this court, be, and the same hereby is, affirmed, and that in accordance therewith the said plaintiff
51 and appellee recover of the said defendants, Reuben P. Segrist, William B. Stapp, and Benjamin Stoops, the sum of six thousand six hundred and thirty-three dollars and four cents, with interest thereon from the eleventh day of August, 1884, at the rate of six per cent. per annum, together with his costs in this behalf expended, as well in the court below as in this court, to be taxed, and that he have execution therefor; and it appearing to the court that William B. Stapp and William Robert are securities on the appeal bond herein, it is considered by the court that the said William B. Crabtree recover of said William B. Stapp and William Robert, securities as aforesaid, the said sum of six thousand six hundred and thirty-thre- dollars and four cents, together with interest and costs as aforesaid, and that he have execution therefor.

And be it further remembered that on the 27th day of May, 1885, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico a writ of error in the above-entitled
52 cause, the original of which is hereto attached and is in the words and figures as follows, to wit:

Copy of Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the supreme court of the Territory of New Mexico, Greeting:

Because that in the record and process and also in the rendering of judgment in the said supreme court of the Territory of New Mexico, before you, in a suit between Reuben P. Segrist, Sim. Holstein, William B. Stapp, Benjamin Stoops, and Frank E. Bell, plaintiffs in error, and William B. Crabtree, defendant in error, a manifest error has intervened, to the great damage of the said Reuben P. Segrist, Sim. Holstein, William B. Stapp, Benjamin Stoops, and Frank E. Bell, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid, do command you, if
53 judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, the present seat of the National Government, on the second Monday in October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 27th day of May, in the year of our Lord one thousand eight hundred and eighty-five.

[SEAL.] C. M. PHILLIPS,
Clerk Supreme Court Territory of New Mexico.

TERRITORY OF NEW MEXICO, *ss:*

In the Supreme Court.

I, C. M. Phillips, clerk of the supreme court of the Terri-
54 tory of New Mexico, do hereby certify that the above and foregoing is a true and complete copy of a writ of error from the Supreme Court of the United States to the supreme court of the Territory of New Mexico, in a cause wherein Reuben P. Segrist, Sim. Holstiene, William B. Stapp, Benjamin Stoops, and Frank E. Bell are plaintiffs in error and William B. Crabtree is defendant in error, and that the said plaintiff in error did, on this day, lodge in my office this the said copy of said writ for the said William B. Crabtree, defendant in error, pursuant to the provisions of section 1007 of the Revised Statutes of the United States, it being the purpose of said plaintiffs in error to have said writ of error operate as a supersedeas pursuant to law.

Witness my hand and the seal of said supreme court of the Territory of New Mexico this 27th day of May, 1885.

C. M. PHILLIPS, *Clerk.*

Endorsed: Territory of New Mexico supreme court. Reuben
55 P. Segrist *et al.*, plaintiffs in error, *vs.* William B. Crabtree, defendant in error. Writ of error to supreme court of the Territory of New Mexico. Filed May 27th, 1885. C. M. Phillips, clerk supreme court Territory of New Mexico.

And be it further remembered that on the 25th day of May, 1885, the following proceedings were had, to wit:

Order Fixing Amount of Supersedeas Bond.

TERRITORY OF NEW MEXICO:

In the Supreme Court. January Term, A. D. 1885.

REUBEN P. SEGRIST, SIM. HOLSTINE, WILLIAM B. STAPP, BENJAMIN STOOPS, and FRANK E. BELL, Plaintiffs in Error,
vs.
WILLIAM B. CRABTREE, Defendant in Error.

In this cause the above-named plaintiffs in error, having sued
56 out a writ of error from the Supreme Court of the United States to this court to review the judgment of this court lately and at the present term thereof rendered therein in favor of said defendant in error, and application having been duly made to this court therefor by said plaintiffs in error, it is ordered that the

penalty of the bond in error in said cause so removed to the Supreme Court of *of* the United States be, and the same hereby is, fixed at the sum of fifteen thousand dollars ($15,000.00). It is further ordered that upon the execution and filing of said bond within sixty days from the rendition of said judgment, with sureties to be approved by the honorable chief justice of this court or one of the associate judges thereof in case of his absence, and upon the plaintiffs in error otherwise complying with the requirements of the statutes in such cases made and provided relating to writs of error from said supreme courts of the United States, then and thereupon all further proceedings upon the judgment of this court in this cause shall be stayed until the further order of the Supreme Court of the United States in that behalf.

57 It is further ordered that responsible sureties, residents of the Territory of New Mexico and acceptable to the judge approving said bond in error, shall be received and accepted.

Dated this 25th day of May, A. D. 1885.

S. B. AXTELL,
Chief Justice Supreme Court of the Territory of New Mexico.

And afterwards, on, to wit, the 27th day of May, 1885, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico an affidavit of value, which is in words and figures as follows, to wit:

Affidavit of Value.

TERRITORY OF NEW MEXICO, } *ss:*
County of Santa Fé, }

In the Supreme Court of the Territory of New Mexico.

REUBEN P. SEGRIST, SIM. HOLSTINE, WILLIAM B. STAPP, BENJAMIN STOOPS, and FRANK E. BELL, Plaintiffs in Error,
vs.
WILLIAM B. CRABTREE, Defendant in Error.

Reuben P. Segrist, being duly sworn, deposes and says that he is one of the plaintiffs in error in the above-entitled cause, and
58 that the value of the property in controversy in said cause exceeds the amount of five thousand dollars exclusive of costs and fees.

R. P. SEGRIST.

Subscribed and sworn to before me this 27th day of May, 1885.
[SEAL.] C. M. PHILLIPS,
Clerk Supreme Court, Territory of New Mexico.

Endorsed: Reuben P. Segrist *et al.*, plaintiffs in error, *vs.* William B. Crabtree, defendant in error. Affidavit of value. Filed May 27th, 1885. C. M. Phillips, clerk supreme court, Territory of New Mexico.

And afterwards, on, to wit, the 6th day of June, 1885, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico a supersedeas bond in the above-entitled cause, which is in words and figures as follows, to wit:

Supersedeas Bond.

Know all men by these presents that we, Reuben P. Segrist,
59 William B. Stapp, and Benjamin Stoops, as principals, and A. H. Whetstone and C. D. Bonny, as sureties, are held and firmly bound unto William B. Crabtree in the full and just sum of fifteen thousand dollars ($15,000), to be paid to the said William B. Crabtree, his certain attorney, executors, administrators, and assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these present.

Sealed with our seals and dated this 30th day of May, in the year of our Lord one thousand eight hundred and eighty-five.

Whereas lately at a term of the supreme court of the Territory of New Mexico in a suit depending in said court between Reuben P. Segrist, Sim. Holstine, William B. Stapp, Benjamin Stoops, and Frank E. Bell, plaintiffs in error, and William B. Crabtree, defendant in error, judgment was rendered against the said Reuben P. Segrist, Sim. Holstine, William B. Stapp, Benjamin Stoops, and Frank E. Bell, and the said Reuben P. Segrist, Sim. Holstine, William
60 B. Stapp, Benjamin Stoops, and Frank E. Bell having obtained their writ of error from the Supreme Court of the United States, and filed a copy thereof in the clerk's office of said court, to reverse the judgment in the aforesaid suit, and a citation, directed to the said William B. Crabtree, citing and admonishing him to be and appear at the Supreme Court of the United States to be holden at Washington, in the District of Columbia, on the second Monday of October next:

Now, the condition of the above obligation is such that if the said Reuben P. Segrist, Sim. Holstine, William B. Stapp, Benjamin Stoops, and Frank E. Bell shall prosecute its said writ of error to effect and answer all damages and costs, including just damages for delay, if they fail to make good their plea, then the above obligation to be void; else to remain in full force and virtue.

R. P. SEGRIST. [SEAL.]
BENJAMIN STOOPS. [SEAL.]
A. H. WHETSTONE. [SEAL.]
C. D. BONNEY. [SEAL.]
WM. B. STAPP. [SEAL.]

Sealed and delivered in presence of—
FRANK H. LEA.

61 The above bond in error, and the same to operate as a supersedeas, is this day approved by me at Springer, New Mexico.

Dated Sept. 25th, 1885.

WM. A. VINCENT,
Chief Justice, &c.

UNITED STATES OF AMERICA, }
Territory of New Mexico, } *ss:*

We, A. H. Whetstone and C. D. Bonney, being duly sworn, depose and say and each for himself saith that he is worth the sum of fifteen thousand ($15,000.00) over and above all his just debts and liabilities.

C. H. WHETSTONE.
C. D. BONNEY.

Subscribed and sworn to before me this 30th day of May, 1885.
[NOTARIAL SEAL.] FRANK H. LEA,
Notary Public.

Endorsed: Reuben P. Segrist *et al.*, plaintiffs in error, *vs.* William B. Crabtree, defendant in error. Bond to defendant in error. Filed June 6th, 1885. C. M. Phillips, clerk.

Supreme Court, Territory of New Mexico.

62 THE UNITED STATES OF AMERICA, *ss:*

To William B. Crabtree, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the Territory of New Mexico, wherein Reuben P. Segrist, Sim. Holstine, William B. Stapp, Benjamin Stoops, and Frank E. Bell are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Samuel B. Axtell, chief justice of the supreme court of the Territory of New Mexico, and the seal of said court, the 25th day of May, in the year of our Lord eighteen hundred and eighty-five.

[Seal Supreme Court, Territory of New Mexico.]

S. B. AXTELL,
Chief Justice of the Supreme Court of the Territory of New Mexico.

62½ I hereby acknowledge service of the within citation, through the post office, on the 16th day of September, A. D. 1885.

W. D. LEE,
Attorney for Plaintiff in the Judgment, W. B. Crabtree.

[Endorsed:] 213. Territory of New Mexico, supreme court. Reuben P. Segrist *et al.*, plaintiffs in error, *vs.* William B. Crabtree, defendant in error. Citation. Filed Sept. 16th, 1885. C. M. Phillips, clerk supreme court, Territory of New Mexico.

63 And afterwards, on, to wit, the 16th day of September, 1885, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico a citation in the above-entitled cause, the original of which, with the endorsements thereon, is hereto attached, and is in words and figures as follows, to wit:

The United States of America to William B. Crabtree, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the Territory of New Mexico, wherein Reuben P. Segrist, Sim. Holstein, William B. Stapp, Benjamin Stoops, and Frank E. Bell are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ
64 of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Samuel B. Axtell, chief justice of the supreme court of the Territory of New Mexico, and the seal of said court, the 25th day of May, in the year of our Lord eighteen hundred and eighty-five.

[SEAL.]

S. B. AXTELL,
Chief Justice of the Supreme Court of the Territory of New Mexico.

I hereby acknowledge service of the within citation through the post office on the 16th day of September, 1885.

W. D. LEE,
Attorney for the Plaintiff in the Judgment, W. T. Crabtree.

Endorsed: Reuben P. Segrist *et al.*, plaintiffs in error, *vs.* William B. Crabtree, defendant in error. Citation. Filed Sept. 16th, 1885. C. M. Phillips, clerk supreme court, Territory of New Mexico.

65 And heretofore, on, to wit, the 14th day of March, 1885, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico the opinion of the judges of said court in said cause, a copy of which is hereunto annexed in accordance with the amendment to rule 8th of the Supreme Court of the United States, to be herewith transmitted, which is in words and figures as follows, to wit:

66 *Opinion of Supreme Court of New Mexico.*

TERRITORY OF NEW MEXICO:

Supreme Court. January Term, A. D. 1885.

WILLIAM B. CRABTREE, Appellee,

vs.

REUBEN P. SEGRIST *et al.*, Appellants.

Appeal from the district court for the county of San Miguel.

BELL, *J.*:

This is an action in trover brought to recover the value of certain cattle claimed to belong to appellee, the plaintiff in the court below, and unlawfully taken from him and converted by defendants to their own use. The facts of the case are briefly as follows: In 1880 the plaintiff bought of one Babb the remnant, as it is termed in the record, of the latter's herd of cattle, then to be found on certain ranges in Texas. The plaintiff came after said cattle and secured them.

At the time of making this agreement plaintiff gave Babb notes for the amount agreed upon as the purchase-money and received from Babb a bill of sale for the cattle. Thereafter plaintiff
67 secured and took possession of the cattle, but how many head there were does not appear from the evidence in the record before us.

The only serious contention in the evidence is as to whether this transaction was an absolute or merely a conditional sale, the plaintiff insisting and giving evidence tending to show that the sale was absolute, accompanied by a bill of sale absolute on its face, and by delivery of possession of the cattle as fast as they could be secured by him, and that his notes were given in full satisfaction.

These notes consist of two promissory notes, each for the sum of eight hundred dollars, one payable in September, 1881, and the other in September, 1882. The defendants, however, insist and introduced evidence tending to show that the sale was conditional upon the payment of the notes at maturity, it being agreed between the plaintiff and Babb that the title to the cattle should remain in the latter until the notes were paid, and that if not paid when due he might assert his title and resume possession of the cattle.
68 After the cattle were secured by the plaintiff he drove them from the range in Texas upon which they had been found by him into Lincoln county, New Mexico.

The notes were not paid at maturity, and thereafter, in January or February, 1882, Babb undertook to sell the cattle to the defendants. He sent his son, armed with a power of attorney, to take possession of the cattle. This son, accompanied by the defendants or some of them, went on the range in New Mexico, where the cattle were being herded in connection with other cattle belonging to the plaintiff, in charge of an employee of the plaintiff, and took possession of them and sold them to the defendants.

It does not appear that this employee of the plaintiff had any authority to give up the possession of the cattle. No exceptions whatever to the evidence are contained in the record, and while interesting questions might have been presented as to the propriety of admitting parol testimony tending to contradict the terms of the bill of sale, and to change it from a bill of sale absolute to a conditional one or from a bill of sale from Babb to Crabtree into a chattel mortgage from Crabtree to Babb, and as to the identity of the cattle taken by defendants with cattle transferred by Babb to plaintiff, and as to Babb's right to take the enforcement of the condition of the sale, even if proved, into his own hands, and to take the cattle from the plaintiff's possession without any legal proceeding, and as to the right of Babb or his agent to take possession of the cattle, sell them, and appropriate the entire proceeds to his own use, when at most all that could be claimed upon the defendants' theory of the case would be that he had such a lien upon the property as would authorize him to take and sell it for the purpose of recovering back payment for the cattle, as was reserved by the bill of sale—we are now confined by the record to certain exceptions to the charge as given and to refusals to charge as requested.

The only other points to which our attention has been called by the appellants are assignments of error to the effect that there is no evidence to sustain the verdict against any defendant other than Segrist, and that there is no evidence of a demand before suit.

It does not appear that either of those points was raised or insisted upon at the trial, and we are therefore of opinion that they cannot now — presented and urged before us. The general rule that only such assignments of error can be presented to the appellate court as were brought to the attention of the trial judge, so as to permit of their correction by him, is strengthened in this Territory by the statutory provision, that "no exception shall be taken in an appeal to any proceeding in the district court except such as shall have been expressly decided in that court." Prince's Laws, sec. 5, p. 68, '9.

The record discloses an exception to the giving of plaintiff's second request to charge, but this exception appears to be now abandoned by its omission from the assignments of error; aside from this, we think the request was properly given. The following instructions and refusals to charge are, however, properly before us, being presented both by the record and the assignment of errors. "If you find from the evidence that the plaintiff or his brother purchased the cattle from W. M. or W. T. Babb, and that he or they gave their promissory notes therefor, and the same were accepted by the Babbs, although the notes were deemed only as conditional payment, yet that would be *prima facie* evidence of payment, and the said Babbs, while holding said notes, could not proceed to take possession of the said cattle and horses as their own; their remedy would be upon the notes or to cancel the trade; and if you find from the evidence that said Babbs did under the circumstances just mentioned take possession of the said cattle,

without the authority of the plaintiff, and disposed of them to the defendants, you will find for the plaintiff in the value of the cattle and horses at the time of taking the same, with interest." We think this instruction was proper. It cannot be contended that Babb had the right to both retain the notes and also take possession of the property.

He could not affirm the sale by retaining the notes and
72 the cause of action merged in them—that is, the considera-
tion for the cattle—and at the same time seek to re-cind and abrogate the contract of sale by asserting his title to and taking possession of the cattle.

Error is assigned upon the giving of the plaintiff's fourth request to charge, which is as follows:

"If you believe from the evidence that the plaintiff purchased a portion of the cattle in dispute from W. M. Babb, and that he, the said W. M. Babb, executed and delivered a bill of sale for the same, and that the cattle were at the time scattered on the range, and it being inconvenient or impossible for a manual delivery, the bill of sale would be an actual delivery whenever found; and if, at the time of the delivery of the bill of sale, said Babb accepted said Crabtree's notes, payable in one and two years, the said notes would be a payment therefor, and the said vendors would have to look to their notes for payment."

This instruction proceeds upon the theory that the sale from Babb to plaintiff was an absolute one, a theory as to which the evidence is conflicting, but one which the jury would have been
73 fully warranted in finding; and if the jury found that the
sale was absolute, and without any condition for the return of the cattle, Babb's only right against the plaintiff would be for the purchase-money.

The plaintiff's fifth request to the court to instruct the jury is also assigned as error. It is as follows:

"If the jury find from the evidence that W. T. Babb at the time sold the cattle or any of them to plaintiff in the 'W H I T' brand, and that the sale was on credit, with reservations, and that soon thereafter the plaintiff executed and delivered to the said W. T. Babb his note in payment therefor, which note was accepted by said W. T. Babb, the acceptance of this note by said W. T. Babb on account of this prior indebtedness is *prima facie* satisfaction of the said debt and the discharge of the said conditions and reservations." We think that this instruction was proper. The giving and acceptance of a note is *prima facie* evidence of a settlement between the parties of the differences between them growing out of the transactions with which it is connected. In Massachusetts it
74 was formerly held that the taking of a note was to be regarded
as an absolute payment and discharge of the debt. Thacher *vs.* Dinsmore, 5 Mass., 299; Whitcomb *vs.* Williams, 4 Pick, 228. This was doubtless for the reason that the maker might be called upon to pay not only the vendor of the goods for which the note was given but also a possible innocent holder of the note, who had taken it for a valuable consideration; but now in that State, and

we think generally, the rule is that it is only to be treated as a presumption of payment, which may be rebutted. Butts *vs.* Dean, 2 Metc., 76. And while now, doubtless, unless otherwise agreed upon between the parties, a note is to be regarded as presumption of payment, the creditor may proceed upon the original cause of action upon failure by the debtor to pay the note, yet acceptance of a note is certainly to be regarded as a waiver of any lien upon the property. "The vendor waives his lien by taking from the buyer a bill of exchange or other security, payable at a different date." Benjamin on Sales, sec. 1185.

75 "The vendor's lien is abandoned when he makes a delivery of the goods to the buyer." *Ibid.*, sec. 1186.

In this case Babb could not both accept and retain the notes and at the same time insist upon the performance of the conditions which they were given to obviate.

Error is assigned because the court refused to give to the jury the first instruction asked for by the defendants, which is as follows:

"If the jury believe from the evidence that the cattle in question were agreed to be sold to plaintiff by W. M. Babb or by W. I. Babb, and that in accordance therewith plaintiff was to collect and hold them on the range, keep up the brands, and not sell or move them without permission of Babb, and that the title was to remain in the Babbs until they were paid for by the defendants, and that unless the notes that were given for them were paid the cattle were to remain the property of Babb, and that the bill of sale was simply given to enable the defendant to gather the cattle; and if the jury further believe that the notes were not paid at maturity and

76 have not since been paid, but have been surrendered to plaintiff and accepted by him, then there was no sale of the cattle such as would prevent Babb from retaking possession of the cattle and selling them to Segrist or any one else; in which event the jury should find for the defendant."

This request was properly refused, as it was based upon a state of facts not supported by the evidence in the case. There is nothing in the testimony showing such a surrender of the notes by Babb as would avail the defendants in this suit. The only evidence on the subject is that the notes were handed to the plaintiff by Babb in June, 1884, more than two years after the taking by the defendant of the cattle in question and two years after this suit was commenced.

Certain portions of the instructions given by the court of its own motion were also excepted to, but we think that although certain isolated paragraphs taken by themselves may be open to criticism, they are fully cured by subsequent observations. The whole tone and purport of the charge is certainly as favorable to the

77 defendants as they could ask or expect. In fact, it leaves fully to the jury the only disputed question in the case, namely, was the transaction between Babb and the plaintiff an absolute and irrevocable or a conditional and revocable sale and transfer of the cattle, and instructed them that if they found the sale to have been an absolute one they should render a verdict for the

plaintiff, and if they found the sale to have been a conditional one their verdict should be for the defendant.

This was in effect the whole case, and we think it was very fairly left to the jury. The defendant's position was most strongly and favorably presented in their second request to charge, which was given by the court, and is as follows: "If the jury believe from the evidence that the title remained in Babb until the notes were paid, and that said notes were not paid on the day of maturity or at any time since, then Babb had a right to retake the cattle and sell them to others, and if he did so and sold them to Segrist, the jury
78 should find the defendants not guilty. This, certainly, was the most favorable view which the jury could possibly be permitted to take of the transaction. We do not think that the evidence would have justified them in taking such a view; but the court left it to them to do so, and certainly the defendants cannot complain. Taken as a whole, we do not think the charge can be said to have misled the jury or in any manner prejudiced the defendants so as to justify a new trial. The judgment should be affirmed, and it is so ordered.

BELL, *A. J.*

I concur.

WILSON, *A. J.*

UNITED STATES OF AMERICA, *Territory of New Mexico:*

I, C. M. Phillips, clerk of the supreme court of the Territory of New Mexico, do hereby certify that the above and foregoing is a true and complete copy of the record of proceedings had, judgment given, and opinion filed in the cause herein mentioned as the same now appears remaining in my office.

79 In witness whereof I have hereunto subscribed my name and affixed the seal of the supreme court of the Territory of New Mexico, at Santa Fé, this third day of October, 1885.

[Seal Supreme Court, Territory of New Mexico.]

C. M. PHILLIPS, *Clerk.*

Endorsed on cover: New Mexico Territory supreme court. No. 386. Reuben P. Segrist, Sim. Holstine, William B. Stapp, Benjamin Stoops, and Frank E. Bell, plaintiffs in error, *vs.* William B. Crabtree. Filed October 13, 1885.

Supreme Court of the United States,

October Term, 1888.

No.....

REUBEN P. SEGRIST, SIM HOLSTINE, WILLIAM B. STAPP and BENJAMIN STOOPS,

Plaintiffs in Error,

vs.

WILLIAM B. CRABTREE, Defendant in Error.

Error to the Supreme Court, Territory of New Mexico.

BRIEF FOR PLAINTIFFS IN ERROR.

O. D. BARRETT,
W. T. THORNTON,
Of Counsel.

J. A. Carruth, Printer and Binder, Las Vegas.

Supreme Court of the United States.

October Term, 1888.

No.....

Reuben P. Segrist, Sim Holstine, William B. Stapp and Benjamin Stoops, Plaintiffs in Error, vs. William B. Crabtree, Defendant in Error.	Error to Supreme Court of the Territory of New Mexico.

BRIEF FOR PLAINTIFFS IN ERROR.

STATEMENT OF THE CASE.

This writ of error was sued out to reverse a judgment entered by the Supreme Court of the Territory of New Mexico in favor of the defendant in error, who was the plaintiff below, in action of trover brought against the defendants in error and Frank E. Bell, to recover the value of some five hundred and thirty-five head of range cattle, and seven horses, which said plaintiff below claimed as his own and which he averred the defendants in error had converted to their own use.

The facts on which said ownership was claimed and conversion averred appears in the bill of exceptions, which contains all the evidence, and are as follows:

In 1879 defendant in error, Wm. B. Crabtree, purchased in Texas, of W. I. Babb, forty-six head of range cattle and four horses on credit. Said Crabtree claims that this sale to him was absolute and unconditional. Said Babb claims it was conditional and that the title to the cattle was to remain in him, Babb, until they were paid for.

In 1880, near the time for the payment for said cattle, said Babb called on said Crabtree for some money, who told him that he had no money, that he would give him his note, so he, Babb, could get the money from his, Babb's, father. Thereupon said Crabtree gave said Babb his note for $50.50, which was never paid. Said Babb claims that said note was accepted with the express agreement that if it was not paid said cattle were to go to his father. This is denied by said Crabtree. Whether this note was negotiable or not, does not appear. (R. p. 15.)

And in 1880 said defendant in error, Crabtree, and his brother purchased in Texas of Wm. M. Babb, father of said W. I. Babb, some three hundred head of cattle and horses scattered on the range, to be collected by the Crabtrees, they receiving a bill of sale therefor and giving to said Wm. M. Babb their two promissory notes, each for $800, payable one in September, 1881, and the other in September, 1882; neither of which was ever paid, nor any part thereof. It does not appear whether these notes were. or were not, negotiable.

In the spring of 1881 said Wm. B. Crabtree bought out the interest of his brother in said cattle and horses. It is claimed by the defendant in error that said sale of said

stock to him was absolute and unconditional, and by said Wm. M. Babb that the title to the cattle and horses was to remain in him until said notes were paid, and that said bill of sale was not given to pass title, but to enable the purchasers to collect the cattle on the range.

In January, 1882, no payment having been made on any of said notes, said Wm. M. Babb, the defendant in error, sent his son, said W. I. Babb, to New Mexico, where said stock was then herded, who took with him said notes and a power of attorney from his father to take possession of said cattle and horses.

Said W. I. Babb found said stock in charge of Wm. Carter, an agent of said Crabtree. Babb spoke to Carter, and said: "I guess you know what my business is." Carter said, "I have been looking for you for some time." Babb said then, "I have come for a settlement," and Carter replied, "I have not got the money." Thereupon said Babb took possession of the cattle and horses in question, and soon after sold them to the plaintiff in error, Reuben P. Segrist, for four thousand seven hundred and fifty dollars, and returned said notes to his father.

The defendant in error further claims that said Segrist subsequently sold the cattle in question to "Stapp & Stoop," or "Stoop & Stapp," based on evidence given by him as follows:

> "I saw some of them (the cattle in question). I drove from Salt Fork to New Mexico, at Las Conchas, in possession of Stapp & Stoop. They said they had bought and paid for them, that is, those I saw, I did not see all of them. I met Mr. Segrist * * in September, 1882, * * as well as I can remember he said he sold the cattle to Stapp & Stoop." (R. p. 9).

"I saw cattle there I bought of Brogden, in possession of Stapp & Stoop. * * I don't know if Stapp & Stoop bought all the cattle brought to New Mexico." (R p. 10).

"I sold Lynch sixty-four head of OU brand; they were calves This is the Brogden brand: DOW. I think I saw some of that brand in the possession of Stapp & Stoop. I saw HN cattle with Stapp & Stoop; don't know how many. I saw some, but not half a dozen; I think I saw two." (R. p. 10).

"I bought twenty-two head from young Babb. * * The twenty-two or twenty-three head had the OD brand; saw some in the possession of Stapp & Stoop." (R. p. 11).

No Christian names appear in the evidence, nor anything to indicate the persons that constituted said firms.

SUIT BROUGHT.

Such being the admitted facts, and the disputed matters, the defendant in error brought his said action in trover against Reuben P. Segrist, Sim. Holstine, William B. Stapp, Benjamin Stoops and Frank E. Bell, averring, among other things, a joint act of conversion and demand before suit. All the defendants, except said Bell, filed pleas of not guilty, on which issue was joined. After which, and before the trial, said W. M. Babb returned said notes to his said son, W. I. Babb, who, on the 2d day of June, 1884, returned them to said defendant in error, saying: "This is the first opportunity I have had of giving you your notes," to which the defendant in error responded: "All right." (R. p. 18.)

No evidence whatever was given or offered as to the defendant Holstine, nor any tending to prove a demand

made on any of the defendants before suit brought; nor any evidence tending to prove a joint act of conversion by all of the defendants, or any act of conversion by any of them, except by the defendant Segrist, unless said evidence as to "Stapp & Stoop," quoted above, can be considered evidence against the defendants, or some of them.

The plaintiff in error gave evidence as to said matters in dispute, tending to prove that both said sales of cattle and horses, first by W. I. Babb to him in 1879, the second to him and his brother by W. M. Babb in 1880, were absolute and unconditional.

He also gave to the jury the evidence quoted above on pages 3 and 4, under the presumed supposition that it tended to prove a conversion of said cattle by the defendants, William B. Stapp and Benjamin Stoops, by a purchase of the same from the said Reuben P. Segrist.

The defendants in error gave evidence as to the matters in dispute, tending to prove that the said sale of cattle and horses in 1879, and also said sale in 1880, were conditional, that the title to the cattle and horses were, by express agreement, to remain in the vendors until paid for, that the bill of sale given by W. M. Babb in 1880, was not given to pass title, but to serve as authority to the Crabtrees to gather said cattle on the range.

TRIAL IN THE DISTRICT COURT.

The cause coming on for trial, the undisputed facts were proved to be as above stated, and evidence was given tending to prove the matters in dispute by the defendant in error to be as claimed above by him, and by the defendants below to be as claimed above by them. And the evi-

dence being closed, the Court at the request of the plaintiff below, instructed the jury as follows:

2. If the jury find from the evidence that the cattle and horses in question belonged to the plaintiff, Crabtree, and the same came into the possession of the defendant without the consent or authority of the plaintiff, and that the defendants converted them to their own use, you will find for the plaintiff and assess his damages at the value of the property at the time of taking and converting the same, with interest.

3. If you find, from the evidence, that the plaintiff or the plaintiff and his brother purchased the cattle from W. M. Babb or W. T. Babb, and that he or they gave their promissory note in payment therefor, and the same was accepted by the Babbs, although the notes were taken only as conditional payments, yet they would be *prima facie* evidence of payment, and the said Babbs, whilst holding said notes, could not proceed to take possession of the said cattle and horses as their own. Their remedy would be upon the notes or to cancel the trade, and if you find, from the evidence, that said Babbs did, under the circumstances just mentioned, take possession of said cattle without authority of the plaintiff and dispose of them to the defendants, you will find for the plaintiff the value of the cattle and horses at the time of taking the same, with interest.

4. If you find, from the evidence, that the plaintiff purchased a portion of the cattle in dispute, from W. M. Babb, and that he, the said W. M. Babb, executed and delivered a bill of sale for the same, and that the cattle were at the time scattered on the range, and it being inconvenient or impossible for a manual delivery, the bill of sale would be an actual delivery whenever found; and if, at the time of the delivery of the bill of sale, said Babb accepted said Crabtree's notes, payable in one and two years, the said notes would

be a payment therefor, and the said vendors would have to look to their notes for payment.

5. If the jury find, from the evidence, that W. Babb at a time sold to plaintiff the cattle or any of them in the WHIT brand, and that the sale was on a credit, with conditions and reservations, and that subsequent thereto the plaintiff executed and delivered to said W. I. Babb his note in payment therefor, which note was accepted by said W. I. Babb, the acceptance of this note by W. I. Babb on account of this prior indebtedness is *prima facie* satisfaction of said debt and discharge of said conditions and reservations. R. p. 23.

To each of said instructions the defendants objected, their objections were overruled and exceptions taken.

The defendants below then requested the Court to give the following instructions to the jury, to-wit:

1. If the jury believe, from the evidence, that the cattle in question were agreed to be sold to plaintiff, part by W. M. Babb and part by W. I. Babb, and that in accordance therewith plaintiff was to collect and hold them on the range, keep up the brands, and not sell or move them without permission of Babb, and that the title was to remain in the Babbs until they were paid for by defendants, and that unless the notes given for them were paid and the cattle were to remain the property of Babb, and that the bill of sale was given simply to enable defendants to gather the cattle, and if the jury further believe that the notes were not paid at maturity and have not since been paid, but have been surrendered to plaintiff and been accepted by him, then there was no sale of the cattle such as would prevent Babb from retaking possession of the cattle and selling them to Segrist or any one else; in which event the jury should find for the defendants.

2. If the jury believe, from the evidence, that the title to the cattle remained in Babb until the notes were paid, and that said notes were not paid at maturity or at any time since, then Babb had a right to retake the cattle and sell them to others, and if he did so and sold them to Segrist the jury should find defendants not guilty.
3. If the jury believe, from the evidence, that the bill of sale in evidence was not given to pass the absolute title, but simply to enable plaintiff to gather the cattle with, and that it was agreed that the cattle were to remain as property of Babb until paid for according to the terms of the notes, and that the bill of sale was not a consummation of the contract, but merely a circumstance put into the contract so as to gather the cattle, it must not be considered as transferring the title of the cattle.
4. If the jury believe, from the evidence, that plaintiff did not have absolute title to the cattle in question and that, contrary to the agreement with Babb, he moved them from their range in New Mexico, and that plaintiff had, in accordance with the agreement, failed to pay either of the said notes when due, then Babb had the right to retake the cattle and sell them, and in that case the jury should find the defendants not guilty.
5. If the jury believe, from the evidence, that the plaintiff agreed to purchase the cattle and was to retain them on the range and keep up the brands, and that the title of the cattle remained in Babb, and that after default of one of the notes Babb had the right to retake the cattle, and that plaintiff branded other cattle with the same brands and mixed them in with the herd so that they could not be distinguished from the Babb cattle, then Babb would have the right to take all the cattle he could not distinguish and sell them, he being responsible therefor to plaintiff.

6. If the jury believe, from the evidence, that the Carters were in charge of the cattle in question, and that they were the agents of plaintiff with reference to said cattle, and had the right to settle any claims with reference to them, and that they turned over said cattle to settle the claims of the Babbs, then the jury should find for the defendants.

7. A promissory note is never considered as payment unless it is taken absolutely as payment; if there be any agreement that a note is not to be considered payment if unpaid at maturity, then it is no payment; but the payment of the note only will be the payment of the original claim, and in such case the original contract will remain independent of the notes.

8. If the jury believe, from the evidence, that the cattle in question were liable for the payment of the notes, and that plaintiff, contrary to his agreements removed them from Texas and did not pay the notes, and that when the notes fell due and Babb applied to the agent of the plaintiff in charge of the cattle for a settlement, that that agent voluntarily turned over the cattle, then you must find for the defendants. (R. pp. 24, 25.)

All these instructions were given except the first, which the court refused to give, to which refusal objection was made by the defendants below, which was overruled by the court, and an exception taken.

Then the court of its own motion gave the jury the following instructions, to-wit:

"Gentlemen of the Jury: The facts to be found from the evidence by you are, principally—

"First. Who was the owner of the stock taken from the Carters by Babb?"

"Second. What was the value of said stock?

If you find that the stock was the property of plaintiff Crabtree you will find a verdict in his favor for the value of the cattle, with interest from the time Babb took possession of them, at the rate of six per cent."

"If, however, you believe from the evidence that the stock delivered to Babb or taken by him from Carter belonged to him or to him and his father or either of them, you will find a verdict for defendant. Unless you find from the evidence that Carter was the agent of Crabtree for the purpose of selling or disposing of his cattle, any delivery to him to Babb would not bind Crabtree."

The court also instructs you that a bargain and sale of personal property, accompanied by delivery divests the vendor of any lien for payment, unless such lien is secured by chattel mortgage or by agreement between the parties.

"If you find from the evidence that Babb sold and delivered the stock on the range and took promissory notes in payment, this would be an absolute, unconditional sale and Babb could not retake stock. Babb's remedy in such case would be by suit to collect what might be due him upon said notes."

"Should you find from the evidence that Carter had authority from Crabtree to settle his debts and to sell and dispose of his cattle, and you also find that he delivered said band of cattle in payment of said notes, and was authorized to do so, you will find for the defendants."

"This contention is one of fact rather than law. The dispute arises as to the true character of an agreement."

" The agreement is just what the parties intended to make it. What did the parties intend when they made the agreement? Did not the Babbs intend to get some twenty-one or twenty-two hundred dollars and Crabtree intend to get a brand of cattle? Did the Babbs intend to reserve a vendor's lien for this sum of money? This they could do by an agreement to that effect. If you believe from the evidence that there was an agreement that upon failure to pay for these cattle the Babbs might take them whenever they

found them, you would be justified in finding defendants not guilty; but if you find that Babbs simply had a vendor's lien for the purchase-money, then they could not enforce the lien in this way, and you must find for plaintiff."

"If they seek to enforce a vendor's lien it should be done in court, so that the surplus, if there was any, might be properly distributed. If your verdict is for defendants it will be not guilty; if for plaintiff you will find the value of the cattle, with interest on the sum from the time they were taken. The cattle were found in this Territory, and the suit is properly brought here."

And to these instructions the defendants below objected, their objection was overruled, and an exception taken.

The jury having been instructed as above, rendered a verdict in which they "found the defendant guilty" without specifying which one of the defendants was the guilty one, and assessed the plaintiff's damages at $6633.04.

No dismissal of the suit or other disposition of it was ever made as to any of the other defendants.

MOTION FOR NEW TRIAL.

The verdict having been rendered as above, a motion was made for a new trial on the following grounds, to-wit:

"First. Because the verdict is against the evidence, and because there is an entire failure of evidence upon material points necessary to be proven."

"Second. Because the court erred in admitting improper evidence offered by plaintiff and objected to by defendants and refusing proper evidence offered by defendants."

"Third. Because the court erred in refusing proper instructions offered by defendants and used improper instructions asked by plaintiff and objected to by defendants."

"Fourth. Because the judge erred in his charge to the jury and misstated the law and so shaped his charge that it was calculated to mislead the jury and did mislead them, because the damages are excessive."

This motion was overruled and judgment entered for the plaintiff below, against three of the defendants below, towit: Reuben P. Segrist, William B. Stapp and Benjamin Stoops for $6633.04.

APPEAL TO THE SUPREME COURT OF NEW MEXICO.

The defendants below appealed from said judgment of the District Court to the Supreme Court of New Mexico, assigning as errors the first six of the assignment of errors below, and a seventh based on the court's refusal to grant the motion for a new trial.

AFFIRMANCE OF JUDGMENT BY THE SUPREME COURT.

The Supreme Court affirmed the judgment of the District Court for reasons stated in its opinion found in the record pp. 37—41, from which the cause was brought here by writ of error.

ASSIGNMENT OF ERRORS.

The plaintiffs in error respectfully present to this court the following assignment of errors.

1. There is no evidence to sustain any verdict against any defendant other than Segrist.

2. There is no evidence to show any demand upon any of the defendants for the return of the property before suit was begun.

3. The court erred in instructing the jury that if they found "from the evidence that the plaintiff or the plaintiff and his brother purchased the cattle from W. M. Babb or W. T. Babb, and that he or they gave their promissory notes in payment therefor and the same was accepted by the Babbs, although the notes were taken only as conditional payments, yet they would be *prima facie* evidence of payment, and the Babbs whilst holding said notes could not proceed to take possession of the said cattle and horses as their own; their remedy would be upon the notes or to cancel the trade; and if you find from the evidence that the said Babbs did, under the circumstances just mentioned, take possession of said cattle without authority of the plaintiff and dispose of them to the defendants you will find for the plaintiff the value of the cattle and horses at the time of taking the same, with interest."

4. The court erred in instructing the jury that if they found "from the evidence that the plaintiff purchased a portion of the cattle in dispute from W. M. Babb, and that he, the said W. M. Babb, executed and delivered a bill of sale for the same, and that the cattle were at that time scattered on the range, and it being inconvenient or impossible for a manual delivery, the bill of sale would be an actual delivery whenever found, and if at the time of delivery of the bill of sale said Babb accepted said Crabtree's notes, payable in one and two years, the said notes would be a payment therefor, and the said vendor's would have to look to their notes for payment."

5. The court erred in instructing the jury that if they found "from the evidence that W. T. Babb at a time sold to plaintiff the cattle or any of them in the W H I T brand, and that the sale was on a credit with conditions and reservations, and that subsequent thereto the plaintiff executed and delivered to said W. T. Babb his note in payment therefor, which note was accepted by said W. T. Babb, the acceptance of his note by W. T. Babb on account of the prior indebtedness is, *prima facie*, satisfaction of said debt and discharge of said conditions and reservations."

The court erred in refusing to instruct the jury that if they believed "from the evidence that the cattle in question were agreed to be sold to plaintiff, part by W. M. Babb and part by W. T. Babb, and that in accordance therewith plaintiff was to collect and hold them on the range, keep up the brands and not sell or move them without permission of Babb, and that the title was to remain in the Babbs until they were paid for by the defendants, and that unless the notes given for them were paid the cattle were to remain the property of Babb, and that the bill of sale was given simply to enable defendant to gather the cattle; and if the jury further believe that the notes were not paid at maturity and have not since been paid, but have been surrendered to plaintiff and accepted by him, then there was no sale of the cattle such as would prevent Babb from retaking possession of the cattle and selling them to Segrist or any one else, in which event the jury should find for the defendants."

7. The Supreme Court erred in sustaining a judgment against three of the defendants based on a verdict against one only of the defendants.

8. If said verdict be construed to be against the four

defendants on whose pleas of not guilty, issue was joined, then said court erred in sustaining a judgment against three of the defendants based on a verdict against four.

POINTS AND AUTHORITIES.

I

In the first error assigned it is alleged that there is no evidence to sustain any verdict against any defendant other than Segrist; and in the second, that there is no evidence to show any demand upon any of the defendants for the return of the property before suit was begun.

These two errors will be considered together.

a. On the assumption that the taking possession of the cattle and horses in question by W. I. Babb, as agent for W. M. Babb, was unlawful, then it follows that the purchase of the same by Segrist did not place him in lawful possession of them, and as he admits in his evidence that he did purchase them, it follows that a separate suit in trover against him could be maintained, without any previous demand.

There is no pretense made that any of the other defendants was in any way interested in said purchase by Segrist. And it necessarily follows that this act of conversion was not a joint act of conversion and that it does not therefore sustain the averment of the declaration in that behalf.

b. On the assumption that the evidence quoted, supra, pp. 3–4, can be considered as evidence against the defendants, William B. Stapp and Benjamin Stoop, and that the defendant Segrist had no legal possession of the stock

in question, it would follow that a suit in trover, without previous demand, might be maintained against them as partners for so much of the stock in question as, according to the evidence, they purchased from Segrist.

The evidence for the defendant in error does not prove that said defendants, Stapp and Stoop, purchased all of the stock in question. The defendant in error says he

> "Saw some of them in the possession of Stapp and Stoop. They said they had bought and paid for them, that is those I saw. I did not see all of them. As well as I remember he," (Segrist,) "said he sold the cattle to Stapp and Stoop. I do not know if Stoop and Stapp bought all the cattle brought to New Mexico." (R. pp. 9–10.)

This evidence tends to prove that the defendants Stapp and Stoop purchased a part only of the cattle in question from Segrist, and there is nothing to show how large a part of said cattle he purchased, giving the evidence the widest possible construction in favor of the defendant in error, and it only tends to prove that Segrist sold to the defendants, Stapp and Stoop, three hundred and twenty-six head of cattle, which according to the evidence he, Segrist, purchased from Babb, and which was specified in the verdict. This evidence certainly does not prove, nor tend to prove, that the defendants Stapp and Stoop, purchased the seven horses, or any of them which the evidence shows that Segrist purchased from Babb, and for which seven horses the jury awarded the defendants in error, two hundred and ten dollars.

It is therefore shown that the verdict against the defendants, Stapp and Stoop, if it be construed to be against them, is in no possible manner sustainable as to the value of said seven horses; and that under no circumstances could even a separate suit have been maintained

against said defendants for the value of said horses, for the reason that there is not a particle of evidence in the record showing, or tending to show, that they ever purchased or sold said horses or that they ever had possession of them, or that they ever saw them. It follows that if a separate suit could not have been maintained against them as to any part of the stock in question, without a previous demand, that a joint suit against them and Segrist could not be maintained without a previous demand as to said defendants Stapp and Stoop.

Counsel for plaintiffs in error however maintained that said evidence cannot be construed as relating to them individually as they are sued, because said evidence clearly relates to some partnership, of which one Stapp and one Stoop were the partners; further, that if a suit could be maintained against them individually for acts done by them as partners, still there is nothing to identify them as such partners inasmuch as no christian names are given.

c. There is no evidence whatever connecting the defendant Holstine with the case. Therefore no joint act of conversion was proved as to all of the defendants and, further, no separate suit could have been maintained against them for the stock in question either with or without demand made before suit was brought; and if no separate suit for the stock in question could have been maintained against him, it follows as a matter of course that no joint suit against him and the other defendants can be maintained.

II.

In the third error assigned it is averred that:

"The court erred in instructing the jury that if they found from the evidence that the plaintiff, or the plaintiff and his brother purchased the cattle from W. M. Babb, or W. T. Babb, and that he or they gave their promissory notes in payment therefor, and the same were accepted by the Babbs, although the notes were taken only as conditional payments, yet they would be *prima facie* evidence of payment, and the said Babbs, whilst holding said notes, could not proceed to take possession of the said cattle and horses as their own."

a. As there is nothing in the evidence tending to prove a specific agreement that the promissory notes in question were given "in payment," the court therefore assumed as a matter of law and instructed the jury that the giving and acceptance of said notes was equivalent in law to payment for the stock in question by the Crabtrees.

And that the jury might by no possibility misunderstand said instruction, the court in the last clause of the fourth instruction said to them that:

"The said notes would be a payment therefor and the vendors would have to look to their notes for payment."

And in the last clause of the fifth instruction said to them that

"The acceptance of this note by W. T. (I.) Babb on account of this prior indebtedness is *prima facie* satisfaction of said debt and discharge of said conditions and reservations."

And in the fourth clause of the instruction given of its own motion the court told the jury that it they found

"From the evidence that Babb sold and delivered the stock on the range and took promissory notes in payment. this would be an absolute and unconditional sale and

Babb could not retake the stock. Babb's remedy in said case would be by suit to collect what might be due him upon said notes."

The plaintiffs in error maintained that this instruction of the law of promissory notes is erroneous.

Before referring to authorities on this point, it may be well to call the attention of the court to the fact that the promissory note given to W. I. Babb (R. p. 15,) was for an antecedent indebtedness, while the other two were given to W. M. Babb at the time of his sale of his stock to the Crabtrees.

The true construction of the law as to promissory notes not being a satisfaction of the indebtedness for which they are given, without an express contract to that effect, has been given and often repeated by this court.

In *Peter v. Beverly*, 10 Pet. p. 568, Mr. Justice Thompson in delivering the opinion of the court on the question as to the effect of taking a negotiable note for an antecedent debt, said:

"It is," says the court, (*James v. Hackly*, 16 Johns. 277,) "a settled doctrine that the acceptance of a negotiable note for an antecedent debt will not extinguish such debt unless it is expressly agreed that it is received as payment. It is unnecessary in the present case to carry the principle so far as to say there must be an *express* agreement for that purpose in order to operate as payment; but the evidence must certainly be so clear and satisfactory as to leave no reasonable doubt that such was the intention of the parties. And the rule to this extent is settled by most unquestioned authority. 11 Johns., 513; 14 John., 404; 2 Gill & John., 493; 7 Har. & John., 92."

In *Sheehy v. Mandeville*, 6 Cranch, p. 264, Chief Justice Marshall said:

"That a note without a special contract would not of itself discharge the original cause of action is not denied. But it is insisted that if by express agreement the note is received as payment, it satisfies the original contract, and the party receiving it must take his remedy on it."

"This principle appears to be well settled. The note of one of the parties, or of a third person, may, by agreement, be received in payment. The doctrine of *nudum pactum* does not apply to such a case; for a man may, if such be his will, discharge his debtor without any consideration."

In *Layman v. Bank of the United States*, 12 How., p. 243, Nelson, Justice, said:

"It was objected at the trial that the plaintiffs could not recover under the counts for the original consideration, on the ground that the notes had been received in payment and satisfaction of the indebtedness; and hence the recovery must be upon the notes themselves, if at all." But the Court held that the mere acceptance of the notes by the bank did not necessarily operate as a satisfaction; and that, whether or not there was an agreement at the time to receive them in satisfaction, or whether the circumstances attending the transactions warranted such an interference, were questions for the jury; and submitted the questions accordingly. This court held that said action of the lower Court was correct.

In the case of *The Kimball*, 3 Wall., p. 45, Mr. Justice Field said:

"By the general commercial law, as well of England as of the United States, a promissory note does not dis-

charge the debt for which it is given unless such be the express agreement of the parties; it only operates to extend, until its maturity, the period for the payment of the debt."

It was held in the case of *Downey v. Hicks*, 14 How., p. 249, that the acceptance of a bank certificate of deposit, due at a future day, was not payment of a debt unless specially agreed to be so taken." Also that "the note of a debtor himself, or of a third party is never considered as a payment of a precedent debt unless there is a special agreement to that effect."

The doctrine as above annunciated is supported by the authorities following: *Glem v. Smith*, 2 Gill & John, 493; *Tobey v. Barber*, 5 John. 71; 2 Parsons on Notes and Bills, 153, and notes and authorities there cited; Story on Promissory Notes, 7 Ed., Sec. 104 and notes and cases cited.

b. In the third error assigned it is also averred that the Court erred in instructing the jury that if they found:

> "From the evidence that said Babbs did under the circumstances just mentioned take possession of said cattle without authority of the plaintiff and dispose of them to the defendants, you will find for the plaintiff the value of the cattle, &c."

This part of said instruction is clearly erroneous in as much as there is no evidence on which to base it. The evidence is clear, undisputed and explicit that Babb, after taking possession of the stock in question, disposed of it to the defendant Segrist, and to him alone, and not to the *defendants*.

III.

The fourth error assigned relates to the legal effect of a promissory note given for property at time of delivery and has been fully discussed in point II above.

IV.

In the fifth error assigned it is averred that:

"The Court erred in instructing the jury that if they found from the evidence that W. T. Babb at a time sold to the plaintiff the cattle or any of them in the WHIT brand, and that the sale was on a credit with conditions and reservations, and that subsequent thereto the plaintiff executed and delivered to said W. T. Babb *his note in payment therefor*, which note was accepted by said W. T. Babb, the acceptance of this note by said W. T. Babb on account of this prior indebtedness is *prima facie* a satisfaction of said debt and discharge of said conditions and reservations."

a. The Court in using the above phrase, "note in payment therefor," without any evidence tending to prove an express agreement that the note was given and accepted "in payment," reiterates to the jury its erroneous view of the law that the promissory note of the debtor given for an antecedent debt is a payment thereof, without any express agreement to that effect. That this is error we have already shown.

b. That a promissory note thus given and accepted, without an express agreement that it is so given and accepted in payment, converts a conditional sale into an absolute sale, and cancels all reservations is clearly erroneous by reason of the fact that the promissory note in no

way affects the terms of the contract between the parties, save as it fixes the amount to be paid under the contract and suspends payment until the maturity of the note.

In this particular case, W. I. Babb testified that said note was given with the express contract that if it was not paid the cattle were to go to his father, W. M. Babb. (R. p. 15.) This said Crabtree in his evidence denies. The instruction of the Court now in question, takes from the jury all consideration of this evidence of said W. I. Babb and said Crabtree as to whether there was or was not an express agreement.

We respectfully submit that the law applicable to conditional sales, such as the defendants below claimed the sales in question to be and gave evidence to the jury tending to prove the same, is correctly laid down by the authors and in the decisions following that is to say.

In 1 Par. on Con., 6 ed., p. 537, it is stated: "But when the right to receive payment before delivery is waived by the seller, and immediate possession is given to the purchaser and yet by express agreement the title is to remain in the seller until the payment of the price upon a fixed day, such payment is strictly a condition precedent, and until performance the right of property is not vested in the possessor." In support of this the following cases are cited:

Porter v. Pettingill, 12 N. H., 239; *Sargent v. Gile*, 8 id. 325; *Gambling v. Read*, Meigs (19 Tenn.) 281; *Bigelow v. Huntley*, 8 Vt. 151; *Barrett v. Pritchard*, 2 Pick. 512; *Ayer v. Bartlett*, 9 id. 156; *Tribbetts v. Towle*, 3 Fairf. 341; *Bennett v. Sims*, Rice 421; *Smith v. Lynes*, 1 Seld. 41; *Herring v. Hoppock*, 3 Duer 20; *Brewster v. Baker*, 20 Barb. 364; *Paris v. Roberts*, 12 Ired. L 268;

Smith v. Foster, 18 Vt. 182; *Buckmaster v. Smith*, 22 id. 203; *Root v. Lord*, 23 id. 568; *Aubin v. Bradley*, 24 id. 55, and *Buson v. Dougherty*, 11 Humph. 50. In a note following these citations it is said: "In most of these cases, the question whether the property passed, arose between the parties themselves or between the vendor and attaching creditors of the conditional vendee, and the weight of authorities is as above."

In Chitty on Con. 6 Eng. ed., p. 407, it is stated:

"On a sale with delivery of chattels at a fixed price, to be paid on a certain day, but until paid the title to remain in the vendor, payment is a condition precedent, and until performance the property is not vested in the vendee. The vendor in such case, if guilty of no laches, may reclaim the chattels when the price has not been paid, even from one who has purchased them from his vendee in good faith and without notice."

The author cites in support of the text many of the above named cases, and several others.

In the case of *Harkness v. Russell*, 118 U. S. 663, Mr. Justice Bradley, in delivering the opinion of the Court, after stating certain rules laid down by Lord Blackburn, in his Treatise on the Contract of Sale, on page 667 of the report, said:

"And it is subsequently added that 'the parties may indicate an intention, by their agreement, to make any condition precedent to the vesting of the property, and, if they do so, their intention is fulfilled.'"

On page 668 the learned Judge says: "Mr. Benjamin, in his Treatise on Sales of Personal Property, adds to the formulated rules of Lord Blackburn a third rule, which is supported by many authorities, to-wit:

"(3). 'Where the buyer is by contract bound to do anything as a condition, either precedent or concurrent, on which the passing of property depends, the property will not pass until the condition be fulfilled, even though the goods may have been actually delivered into the possession of the buyer.' Benjamin on Sales, 2d Ed. p. 236; 3d Ed. Sec. 320;" succeeding which the learned Justice cites, reviews and quotes from many cases, and in conclusion, on page 681, adds:

"It is only necessary to add, that there is nothing either in the Statute or adjudged law of Idaho to prevent in this case the operation of the general rule, which we consider to be established by overwhelming authority, namely, that in the absence of fraud, an agreement for a conditional sale is good and valid, as well against third persons as against the parties to the transaction."

In the case of *Lane v. Borland*, 14 Maine 77, it is held that where an unconditional bill of sale was given which recited that the seller had "received payment in notes", and the vendee sold the property to an innocent purchaser, yet the vendor could recover the property from such purchaser on showing that the sale was made on condition that no title was to pass until the purchase money was paid, it being held that the bill of sale imported nothing more than possession of the property would import.

Such is the law as to conditional sales, but the court in holding that the promissory notes given were either inconsistent with a conditional sale or converted a conditional sale into a sale absolute, withdrew from the jury all consideration of the evidence of the defendants below tending to prove that the title to the property in question was to remain in the Babbs until paid for.

V.

In the sixth error assigned it is averred that the court below erred in refusing to give the instruction following, towit:

> If the jury believe, from the evidence, that the cattle in question were agreed to be sold to plaintiff, part by W. M. Babb and part by W. I. Babb, and that in accordance therewith plaintiff was to collect and hold them on the range, keep up the brands, and not sell or move them without permission of Babb, and that the title was to remain in the Babbs until they were paid for by the defendants, and that unless the notes given for them were paid the cattle were to remain the property of Babb, and that the bill of sale was given simply to enable defendants to gather the cattle, and if the jury further believe that the notes were not paid at maturity and have not since been paid, but have been surrendered to plaintiff and accepted by him, then there was no sale of the cattle such as would prevent Babb from retaking possession of the cattle and selling them to Segrist or any one else; in which event the jury should find for the defendants.

This refusal must have been based on the courts supposition that no effective surrender of the notes could be made by the Babbs after retaking the cattle and horses, not considering that a surrender of the notes at any time was competent as evidence of non-conversion of the same by the Babbs.

It is respectfully submitted that said instruction thus refused by the court contains a correct statement of the law applicable to this case and that by the refusal alone to grant this instruction the defendants below are entitled to a reversal of the judgment.

The above are the principal errors made by the court in granting and refusing instructions to the jury prayed for by the parties to the suit.

Leaving out all verbiage and circumlocution the instructions given by the court, at the request of the plaintiff, may be summed up in their legal effect as follows:

"Gentlemen:—Evidence has been given by the plaintiff tending to prove that the sale of the cattle and horses in question was absolute and unqualified, and by the defendants tending to prove that said sale was conditional, and that the title to the cattle in question was to remain in the defendants until they were paid for.

"The court instructs you that in this case, it makes no difference whether the sale was absolute or conditional, for if it was absolute, the Babbs had no right to retake the cattle, in which case you must bring in a verdict finding the defendants guilty and assessing the plaintiffs damages at, &c.

"On the other hand if you find from the evidence that the sales in question were conditional, the title to the cattle and horses to remain in the Babbs until they were paid for, the undisputed evidence is that promissory notes were given and received for the full amount of the purchase money. These notes although taken as conditional payments, yet they would be *prima facie* evidence of payment, and so long as they were held by the Babbs they could not retake said cattle and horses, but the undisputed evidence also is that these promissory notes were all held by the Babbs at the time they retook possession of said cattle and horses. You must therefore bring in a verdict finding the defendants guilty and assessing the plaintiffs damages at, &c."

Thus the court having in legal effect instructed the jury that they must find the defendants guilty, regardless of the fact whether the sale was absolute or conditional, proceeds in the second instruction (R. p. 24,) given at the request of the defendants to tell the jury that if the sale was conditional and the notes unpaid at maturity, then Babb had a right to retake the cattle and sell them to others—not that he had this right on first surrendering the notes in question, but that he had it on the notes being unpaid at maturity.

The fourth instruction (R. p. 25,) is in legal effect like the above save that the former is based on the supposition of the non-payment of all the notes at maturity, while the latter is on the supposition of the non-payment of any one of them at maturity, and is equally inconsistent with the instruction given at the request of the plaintiff.

It thus appears that the case was submitted to the jury under such instructions as to necessitate a verdict for the plaintiff below, the instructions being such that any other verdict would have been in direct violation of the instructions given by the court at the request of the plaintiff below.

We have shown conclusively that these instructions, especially the third, (R. p. 23,) are erroneous as statements of law and are also based in part upon supposed evidence, no trace of which is to be found in the record. This having been done is this error neutralized by the fact that the court subsequently granted correct instructions to the jury at the request of the defendants but which were absolutely inconsistent with the former, and which the jury could not follow without totally disregarding the former instructions?

Proffat on Jury Trial, sec. 345, uses the following language in discussing the effect of contradictory instructions:

"Conflicting or inharmonious instructions are often condemned, and are made a cause of reversing a judgment. This often occurs in lengthy charges when dif ferent requests are embodied at the instance of both parties. Thus in an action on a warranty of the genuineness of the endorsement on a note sold by the defendant to the plaintiff, in which the defendant contended that the plaintiff knew that he was acting as agent for a third party, the judge instructed the jury that the plaintiff was bound to show that he was ignorant that the defendant was dealing for a third party, and that if he failed to do this, or if the jury were unable to say on the whole how this was, the plaintiff was not entitled to recover. It was held that this instruction was misleading, though in other parts of his charge the judge stated the law correctly." *Wilder v. Cowles*, 100 Mass. 487.

In *Vanslyke v. Mills*, 34 Iowa, 375, the court say in reference to such instructions in that case which arose from combining various requests:

"Upon a first reading they appear, and upon close inspection and critical examination they will be found to be in conflict with each other, singly and collectively; or at the very best that can be said of them, and putting it in a very mild language, they are inharmonious and misleading. Where instructions of such character are given, it is sufficient reason for reversing a judgment. And the author adds the following note, to-wit: See *Davis v. Strohm*, 17 Iowa, 421. So, in *Chicago &c. R. R. Co. v. Payne*, 49 Ill. 499, it is held not sufficient that a part of the instructions contain a correct exposition of the law, if it is incorrectly announced in others. In *Clem v. State*, 31 Ind. 480, it is held that the Court errs when giving instructions apparently

conflicting, leaving the jury to conjecture which of them should be applied to a given state of facts. To the same point, *R. R. Co. v. Stallman*, 22 Ohio, N. S. 1."

Thus the plaintiffs in error are entitled to a reversal of the judgment by reason of the errors contained alone in the instructions of the Court to the jury.

But the record presents other errors.

VI.

In the seventh error assigned, it is averred that the Supreme Court erred in sustaining a judgment against three of the defendants based on a verdict against only one of the defendants.

It was held in the case of *Richards v. Sperry*, 7 Wis. 219, that a judgment entered against two defendants on a verdict which the jury "say they find the *defendant* guilty," is erroneous and must be reversed, and reference is made to 3 G. & W. on New Trials, 1378.

VII.

It is averred in the eighth error assigned that:

"If said verdict be construed to be against the four defendants on whose pleas of not guilty issue was joined, then said Court erred in entering a judgment against three of the defendants based on a verdict against four."

If all the four defendants before the Court were found guilty, it was the duty of the Court either to set aside the verdict on the motion for a new trial, or else to have entered judgment against all of them, for in entering judgment on a verdict a court can no more look into the evidence to guide them in determining against whom the

judgment should be entered, than they can look into the evidence to determine the amount of the verdict. The judgment is to be entered on the verdict and not on the evidence.

There can be no doubt that in the present case, the Court resolved itself into a jury, and determined, from its opinion of the evidence, the parties against whom the judgment should be entered, totally regardless of the question whether the jury found only one of the defendants guilty and used the singular "defendant" to embody their conclusion, or whether they in fact found all four guilty and failed to embody this finding in their evidence by using the singular "defendant" by mistake for the plural "defendants."

The defendants below were entitled to a trial by jury, this right they did not waive. The Court by its instructions rendered a trial, properly so called, by jury an impossibility, in that they could render no verdict for either party without disregarding some of the instructions of the Court, then refused to correct the errors when asked so to do by the motion for a new trial and completed the farce by entering judgment in utter disregard of the findings of the jury.

We respectfully submit that such a proceeding needs only to be known to be set aside.

VIII.

OPINION OF THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO, FILED IN THIS CASE.

In the opinion of the Supreme Court of the Territory of New Mexico, affirming the judgment of the trial Court, it is stated (R. p. 38) that:

"No exceptions whatever to the evidence are contained in the record * * * * We are now con-

fined by the record to certain exceptions to the charge as given and to refusal to charges as requested. The only other two points to which our attention has been called by the appellants, are assignments of error to the effect that there is no evidence to sustain the verdict against any defendant, other than Segrist and that there is no evidence of a demand before suit.

"It does not appear that either of those points were raised or or insisted upon at the trial and we are therefore of opinion that they cannot now be presented and urged before us."

This statement is very remarkable. It seems to be an assumption that the appellate Court can correct no errors of the trial Court, save those to which exception was taken at the trial itself.

The record, p. 27, discloses the fact that a motion for a new trial was made by the defendants below, and numerous reasons assigned therefor, one of which being as follows:

"First. Because the verdict is against the evidence and because there is an entire failure of evidence upon material points necessary to be proven."

One of the material points necessary to be proven in an action of trover is, either an unlawful conversion, or a demand for the return of the property made before the commencement of the suit.

The plaintiff below gave no evidence, even tending to prove either an unlawful conversion by the defendant, Holstine, or a demand on him for the return of the property before the suit was commenced. We also maintain that the same is true as to the defendants Stapp and Stoop. These errors it was in the power of the trial Court to correct by granting a new trial. That Court refused to do it, and the Supreme Court had its attention called thereto and refused to do it, and thus this Court, now, under the strictest rule known to an appellate Court, has full jurisdiction of these errors.

Again a necessary fact to be proved was a joint conversion by all the defendants, as averred in the declaration. There is a total failure of evidence to sustain that averment of the declaration.

The error of the Court in overruling the third error assigned has been discussed at length above, but the reason which the Court gives in its opinion, for sustaining the instructions excepted to, is sufficiently novel to warrant comment thereon.

"We think," says the Court, "this instruction was proper." (i. e. instruction No. 3, R. p. 23). "It cannot be contended that Babb had the right to both retain the notes and also take possession of the property."

There is no evidence that Babb did retain the notes in the sense indicated in the opinion. On the contrary the evidence is that they were returned to Babb at the first opportunity after the taking of the stock. As the notes were not placed in evidence there is nothing to show whether they were or were not negotiable. But as promissory notes, given and received without an express agreement that they are in payment and satisfaction of the original indebtedness, are but collateral security therefor, there is nothing in law or in practice to prohibit a creditor from abandoning his collateral security and relying upon the original indebtedness, or in case the title to the property sold, was by express agreement to remain in the vendor, until payment made, there is nothing in law or in practice to prevent the vendor, on failure of payment being made in accordance with the terms of his contract, from retaking possession of his property wherever he may find it, and such retaking possession then becomes a bar to all further proceedings on the original indebtedness or on any collateral security given therefor.

The opinion on p. 39, sustains the following instructions:

"If at the time of the delivery of the bill of sale said Babb accepted said Crabtree's notes payable in one and two years, the said notes would be a payment therefor and the said vendors would have to look to their notes for payment."

Here the Supreme Court fell into the same error that the trial Court did, in holding a note, without express contract in that behalf, to be payment of the indebtedness for which it was given, and also in holding, in effect, that a bill of sale given is an absolute transfer of title to the property named therein, irrespective of any parol contract to the contrary made at the time.

There can be no doubt of the right of the parties to a bill of sale, to control, by contract, its effect, and if the contract is by parol, and is proved by parol evidence given to the jury without objection, the parol contract is just as effective as if it were in writing.

In this case parol evidence of such a parol contract was given without objection to the effect that said bill of sale was not to transfer the title, but to serve as authority to the Crabtrees to collect the cattle, and the instruction in question, withdrawing this from the jury was error.

The Supreme Court below (R. p. 40) sustained the trial Court in refusing the defendants' first request for instructions to the jury.

The Court overlooked the fact that a surrender of notes after suit commenced, could be effectively made to rebut any presumption of conversion of the same, by reason of non-delivery of them before taking possession of the cattle in question.

As the evidence of their surrender, after suit brought, was given without objection of the plaintiff below, as well

as the evidence of the plaintiff's acceptance of the notes by the use of the words "all right" when he received them, it was competent for the jury to consider that fact and the instruction should have been given as requested.

The last two paragraphs of the opinion totally ignore the duty of the trial Court to give harmonious instruction to the jury. If the course of the trial Court in this case can be upheld, then all that is necessary to do away with appellate Courts is to first instruct the jury, in effect, to bring in a verdict for the plaintiff, and then without withdrawing that instruction to instruct the jury, in effect, to bring in a verdict for the defendant. Then the appellate Court could say to the defeated party, your side of the case was fairly presented to the jury, it was simply your misfortune that the jury followed the first instruction they received instead of the second.

That the above is not an extravagant comment on this case, we place below, on the left, an instruction given at the request of the plaintiff below, and on the right an instruction given at the request of the defendants below.

"If you find from the evidence that the plaintiff or the plaintiff and his brother purchased the cattle from W. M. Babb, or W. T. Babb, and that he or they gave their promissory notes in payment therefor and that the same were accepted by the Babbs, although the notes were only taken as conditional payments, yet they would be *prima facie* evidence of payment, and the said Babbs whilst holding said notes, could not proceed to take possession of said cattle and horses as their own."

"If the jury believe from the evidence that the title of the cattle remained in Babb until the notes were paid, and that said notes were not paid at maturity, or at any time since then, Babb had a right to retake the cattle and sell them to others, and if he did so and sold them to Segrist, the jury should find defendants not guilty."

Notwithstanding the contradictory instructions given, the Supreme Court of New Mexico says, in the paragraph next to the last of said opinion, that the charge "leaves fully to the jury the only disputed question in the case, namely, was the transaction between Babb and the plaintig an absolute and irrevocable or a conditional and revocable sale and transfer of the cattle."

But instead of leaving this question to the jury, the Court, by granting the instructions quoted above on the left of the page, directed the jury to find for the plaintiff in case they found from the evidence that the Crabtrees gave their notes for the cattle and that the Babbs held said notes at the time they re-took possession of said cattle.

As it was not in dispute that the Crabtrees gave their notes for the cattle, or that W. M. Babb held those notes when he re-took possession of them, the instruction of the Court was a positive direction to the jury to find a verdict for the plaintiff, and this irrespective of the question as to whether there had been a joint act of conversion; irrespective of the question as to whether each of the defendants had become individually liable to the plaintiff for all the cattle and horses purchased by Segrist from Babb; irrespective of the question as to whether any demand before suit had been made of those defendants against whom there was no evidence tending to prove a conversion; irrespective of the question as to whether one alone of the four defendants could be found guilty of act averred in the declaration to be the joint act of the four; and irrespective of the question whether the four defendants could be found guilty of an act averred to be the joint act of all, nowithstanding a total failure of evidence as to some of them.

Respectfully submitted.

O. D. BARRETT,

W. T. THORNTON,

Of Counsel.

Office Supreme Court U. S.
FILED.
JAMES H. McKENNEY.

Supreme Court of the United States.

OCTOBER TERM, 1887.

REUBEN P. SEGRIST *et al.*,
Plaintiffs in Error,

vs.

WILLIAM B. CRABTREE,
Defendant in Error.

No. 386.

BRIEF IN BEHALF OF PLAINTIFFS IN ERROR ON DEFENDANT'S MOTION TO DISMISS ON GROUND THAT CITATION WAS NOT SERVED THIRTY DAYS BEFORE THE RETURN DAY OF THE WRIT.

Argument.

The facts stated in the motion show that plaintiffs in error have fully complied with the fifth section of the eighth rule of this Court, which simply provides that the citation be served *before* the return day of the writ. It was so served.

O. D. BARRETT,
Of Counsel for Plaintiffs in Error.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1888.

No. 115.

SEGRIST AND OTHERS, PLAINTIFFS IN ERROR,

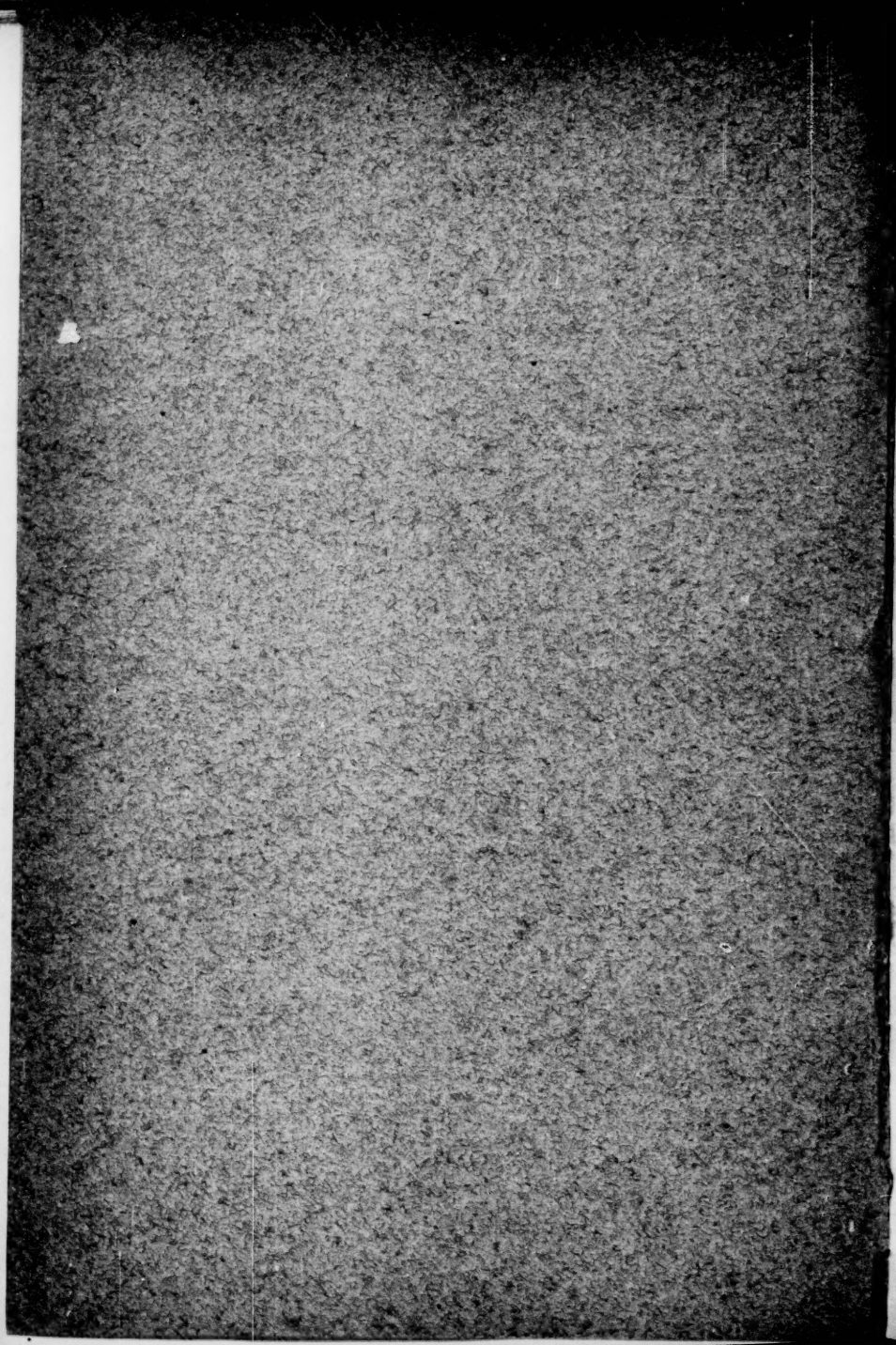
vs.

CRABTREE.

BRIEF FOR CRABTREE.

S. F. PHILLIPS,
W. H. LAMAR,
J. G. ZACHRY,
For Crabtree.

JUDD & DETWEILER, PRINTERS.



IN THE

Supreme Court of the United States.

OCTOBER TERM, 1888.

No. 115.

SEGRIST AND OTHERS, PLAINTIFFS IN ERROR,

vs.

CRABTREE.

BRIEF FOR CRABTREE.

The record presents a case in *trover* brought by Crabtree against the plaintiffs in error for certain cattle and horses.

Crabtree's title to these was by virtue of two sales made severally by one W. M. Babb and his son, W. I. Babb, all three being residents of Texas and the sale occurring there. Upon behalf of Segrist, &c., it was contended that these sales had been *conditional*, viz., upon payment of the price, and that because of the breach of this condition a resale, under which they claimed, had properly been made.

Whether such sale was absolute or conditional was the main question upon the trial.

There was no question that in 1879 the younger Babb (W. I.) had contracted to sell certain cattle *upon the range*

(forty or more) to Crabtree (folios 15 and 23); that these were to be collected and counted, and Crabtree was to pay for them at the end of a year (folio 16); that during the next spring the same person also sold to Crabtree some horses (folio 16), and that thereupon the latter gave his note for all ($501.50, folio 15). So also in July, 1880, Crabtree bought of the elder Babb (W. M.) other cattle, for which he gave two notes, for $800 each, payable (1), Sept., 1881, and (2), Sept., 1882, (folio 12). The elder Babb was an uncle by marriage, of Crabtree. A brother of Crabtree was joined with him in the sale by the elder Babb, but in the spring of 1881 Crabtree purchased his interest therein. (Folio 13.)

Nothing appears upon the bill of exceptions as to what became of the note given to the younger Babb. He said that Crabtree proposed to him to take it and pass it to his father for money (folio 23), but it does not appear that this was done. The contention at the trial seems to have been so much absorbed in the relations betwixt Crabtree and the elder Babb, that the bill of exceptions is careless of details about the transaction with the younger.

By the fall of 1880 Crabtree had gathered a part of the cattle so purchased; and thereupon he drove them (part in 1880 and part in the spring of 1881) to the Salt Fork of the Brazos. This place was also in Texas, about 110 miles northwest of Babb's residence (folio 15) and 150 miles from the range in which the cattle had been bought (folio 20). Here they were placed in charge of "the Carter boys." The water on the Brazos proving bad for the cattle (folio 16) they were driven, in the fall and winter of 1881, some 200 miles farther northwest, into New Mexico, by the Carters; and here, in January, 1882, they were taken by W. I. Babb, acting under a power of attorney from his father, and immediately thereafter were sold to *Segrist*, into the possession of whom and of *Stapp* and *Stoops*, they thereupon went, (folios 15, 17). Whether *Stapp* and *Stoops* bought the whole interest or a part only, or whether or not they became tenants in common with *Segrist* does not

appear; the bill of exceptions and motion for new trial (folio 41) making no point upon any want of connection in the *conversion* by the defendants, nor also, as may be here added, as to any necessity of a *demand* upon them before bringing this suit.

The evidence upon the character of the sale to Crabtree—*i. e.*, whether absolute or conditional—is contradictory. Crabtree himself and his brother (folios 14 & 19) testified that it was absolute. Whether this testimony was credible is not a question here. The jury seems to have believed it, and the circumstance that this was done by a New Mexico jury, in a suit brought by one of the witnesses himself in a *vicinity* five hundred miles from where in another State he was living, (folio 16) against neighbors of their own, speaks volumes on behalf of the *concurrence* of the *assertions* of those witnesses with their *bearing* in court, their display of *candor* and *intelligence*, and those other influential circumstances of the trial-drama which a bill of exceptions cannot reproduce and which courts of error wisely take for granted.

Evidence was also given by the plaintiff tending to show that the notes given for the price of the cattle, &c., were so given in payment therefor (presumably *conditional*, of course: notes to Tobey *vs.* Palmer, 2 Am. Lead. Cas., 225-246), and this also was contradicted by the defendants. By the expression "the notes," where used in the bill of exceptions without farther description, it appears that the court and parties meant *the two notes* given to the elder Babb, just as the expression "Babb," unless the context shows otherwise, meant *the elder Babb*. Of course, if there be any *obscurity* occasioned by these expressions, this can prejudice only the plaintiff in error, inasmuch as it is *presumed* that no error exists except where plainly shown.

Besides the express evidence in relation to such conditional payment by the notes, there is the *presumption* to that effect, which arises from the circumstance that they were given *contemporaneously* with the sales (1 Wait's Ac-

tions, &c., 568, bottom). That the two notes to the elder Babb were so given is not disputed; but it is said (defendant's brief, 19, top) that the note given to the younger Babb was given subsequently to the sale by him. Upon this point the evidence for the plaintiff is that in 1879 he purchased from the younger Babb a number of cattle, to be paid for at the end of a year (folios 15 and 16), and that during the next spring he also purchased from him six horses and thereupon gave a note for both purchases (folio 16). Upon this it is submitted that by *consolidating* both prices into one note any presumption which attended upon the latter *in part* attended upon it *for the whole*, or, at all events, that as the plaintiffs in error made no distinction below as to the effect of that note upon the different transactions which it covered, they cannot now assign for error—that the learned judge below also did not make such distinction.

Therefore it is submitted that, so far as it is practically important that the trial court put cases to the jury turning upon their finding that the notes, even including that taken by the younger Babb, were taken in payment of the price (by which word, *payment*, the context of his instructions shows plainly that he meant *conditional* payment), there was *evidence* to justify them in so finding.

The taking of the cattle, &c., by the younger Babb and the conversion by the defendants, occurred in January or February, 1882. And this suit was brought on the 2d of June, 1882. The second note to the elder Babb (due in September, 1882,) had seven months to run at the time of such taking, and three months at the commencement of this action. There is no evidence to show that the sale was conditioned upon the payment of the first note to the elder Babb: in the sense that upon its non-payment he could seize the cattle as his own. Nor was there any provision that upon the dishonor of the first note both should become due. The witness *Shipman* was relied upon, apparently, to supply this

defect in the case of the defendants below. It is evident that he was questioned to the very point. At the point where he is contradicting *Crabtree*, as regards the *absoluteness* of the sale by relating what the latter had told him, he concludes the several sentences in which his evidence thereupon was drawn out, as follows: "He said that if he did not come up to his part of the contract the cattle were to fall back to Mr. Babb. *He did not say anything about the first or the last note.*"

Upon this point, therefore, it is submitted that even upon the theory of a *conditional* sale there is no evidence that Babb was to avoid the contract with Crabtree upon a *partial* non-fulfilment by the latter, and that until both notes became due it is true even upon the theory of the plaintiffs in error that after the first note was dishonored Babb's remedy was by action thereupon only.

With these preliminary remarks the *assignments* by the learned counsel for the plaintiffs in error will be considered.

"I" and "VIII" (pp. 15 and 31). It seems that the assignments included under paragraphs thus designated are irregular.

The "first" and "second" assignments (under I) are upon matters that, as was said by the learned court of error below, were not excepted to in the district court. A bill of exceptions is important only as regards the "exceptions" which it contains, the evidence therein detailed being merely *an incident* to these, and so, conclusively presumed to be only so much of what was introduced below as pertained to the exceptions actually taken (Zeller *vs.* Eckert, 4 How., 289, 298). Therefore it does not appear here that, as is assumed upon the face of these assignments, there was "*no evidence*," as to a conversion by other defendants than Segrist; *or* as to a *demand*, supposing one to be important. It is true that the bill of exceptions states expressly (folio 34) that the evi-

dence contained in it "is all the testimony introduced;" but such a certificate, even when standing alone, is surplusage except as to the "exceptions" which it contains, and must be read by that *context*. Besides, there is another context thereto, in the certificate of Chief Justice Axtell, which expressly limits it to its legal effect (folio 42, bottom).

The assignment under VIII is irregular also, because the exception upon which it is founded was taken to a series of propositions *in the mass* (folio 41).

Moulor *vs.* Ins. Co., 111 U. S., 335.

"II" (pp. 18, &c.) This assignment ("third") does not present the whole of the instruction as given below (see folio 35 (3)), a deficiency which may be good matter for a sort of demurrer.

If not, it is to be remarked that the instruction was given at the instance of Crabtree, and therefore upon the hypothesis that the *sale* was *not* "conditional." Thus read, it presents the simple proposition that a vendor who, after an ordinary absolute sale, has put the vendee in possession cannot, upon failure of the latter to make good any conditional payment, retake the goods sold. The insisting upon such "conditional payment" as a part of the proposition seems to have been a circumstance due to the actual case before the court rather than abstractly important. The proposition about *conditional* and *prima facie* payment there made, however, is taken from Ben. on Sales, sec. 733.

"III" (p. 22). Following the example of the learned counsel for the plaintiffs in error, the "fourth" assignment is left under the remarks already submitted.

"IV" (pp. 22, &c.). To appreciate the instruction which is the subject of the "fifth" assignment, it is proper to recall what has already in this brief been stated, viz., that in 1879 (as is not denied) Crabtree bought of the younger Babb cer-

tain cattle upon twelve months' credit, and that before the expiration of that time he also bought from him some horses, and thereupon gave a note that included both purchases. The proposition which Crabtree submits in this connection is, that even if the *sale* in 1879 were upon *condition* of payment, yet that if in 1880 the younger Babb took his note under the circumstances above, and also, as he had testified, without then reserving title (folio 15), the former sale lost its character as conditional, and the proposition of Mr. Benjamin, as above cited, would apply, viz: "But although a bill or note be taken only as a *conditional* payment, yet as it is *prima facie* evidence of payment the vendor who has received it must *account for it* before he can revert to the original contract and demand payment of the price:"—*i. e.*, quâ *price.*

For the purposes of this instruction Crabtree assumes that that the sale in 1879 may have been conditional, but maintains his contention and testimony that the sales at which any note was given were ordinary sales, made without reservation, such notes having been taken as conditional payment.

"V" (p. 26). This assignment ("sixth") assumes that if the jury found that a surrender of the notes had been made and accepted after the commencement of this action, the fact so found would be *not* mere evidence but actually in law a finding, that Crabtree had acquiesced in the taking of the cattle in January, 1882, although one of his notes at the time of such taking was not due. The undisputed facts about the surrender of the notes are that this was not done until June, 1884, two years after this suit had been begun, and at a time and place where the deposition of W. M. Babb therein was being taken. The evidence about the circumstances attending such surrender (folios 12, 24, 27,) is contradictory. It was probably done upon advice, as a witness attended upon young Babb, who acted for his father in the matter (folio 30).

Supreme Court of the United States.

No. 386.—October Term, 1887.

REUBEN P. SEGRIST *et al.*, *Plaintiffs in Error*,

vs.

WILLIAM B. CRABTREE, *Defendant in Error.*

Comes now William B. Crabtree, the defendant in error, by his attorneys, and moves the Court to dismiss the appeal in this case because the citation was not served in time.

J. G. ZACHRY.

Argument.

The citation in this case was made returnable on the second Monday in October, 1885. Service was had on the attorneys for Crabtree on September 16, 1885. The time intervening between the date of service and the return of the citation was less than thirty days, and the notice to the defendant in error, Crabtree, was not sufficient. (*Vide* U. S. Statutes, sec. 999.)

SUPREME COURT OF THE UNITED STATES.

REUBEN P. SEGRIST *et al.*, *Plaintiffs in Error*,
vs.
WILLIAM B. CRABTREE, *Defendant in Error.*
} No. 386. Oct. Term, 1887.

THE UNITED STATES OF AMERICA, *ss:*

To William B. Crabtree, Greeting:

You are hereby cited and admonished to be and appear

at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the Supreme Court of the Territory of New Mexico, wherein Reuben P. Segrist, Sam. Holstein, William B. Stapp, Benjamin Stoops, and Frank E. Bell are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. Samuel B. Axtell, chief justice of the Supreme Court of the Territory of New Mexico, and the seal of said court, the 25th day of May, in the year of our Lord eighteen hundred and eighty-five.

[SEAL.] (Signed) S. B. AXTELL,
Chief Justice of the Supreme Court
of the Territory of New Mexico.

(Page 62 of the record.)

Endorsements: 213. Territory of New Mexico. Supreme Court. Reuben P. Segrist *et al.*, plaintiffs in error, *vs.* William B. Crabtree, defendant in error. Citation. Filed Sept. 16th, 1885. (Signed) C. M. Phillips, clerk Supreme Court, Territory of New Mexico.

I hereby acknowledge service of the within citation through the post office on the 16th day of September, 1885.

(Signed) W. D. LEE,
Attorney for Plaintiff in the Judgment, W. B. Crabtree.

J. G. ZACHRY,
Attorney for William B. Crabtree,
Defendant in Error.

Supreme Court of the United States.

No. 386.—October Term, 1887.

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(Signed) W. D. LEE,
Attorney for Plaintiff in the Judgment, W. B. Crabtree.

J. G. ZACHRY,
Attorney for William B. Crabtree, Defendant in Error.

Supreme Court of the United States.

OCTOBER TERM, 1888.

No. 115.

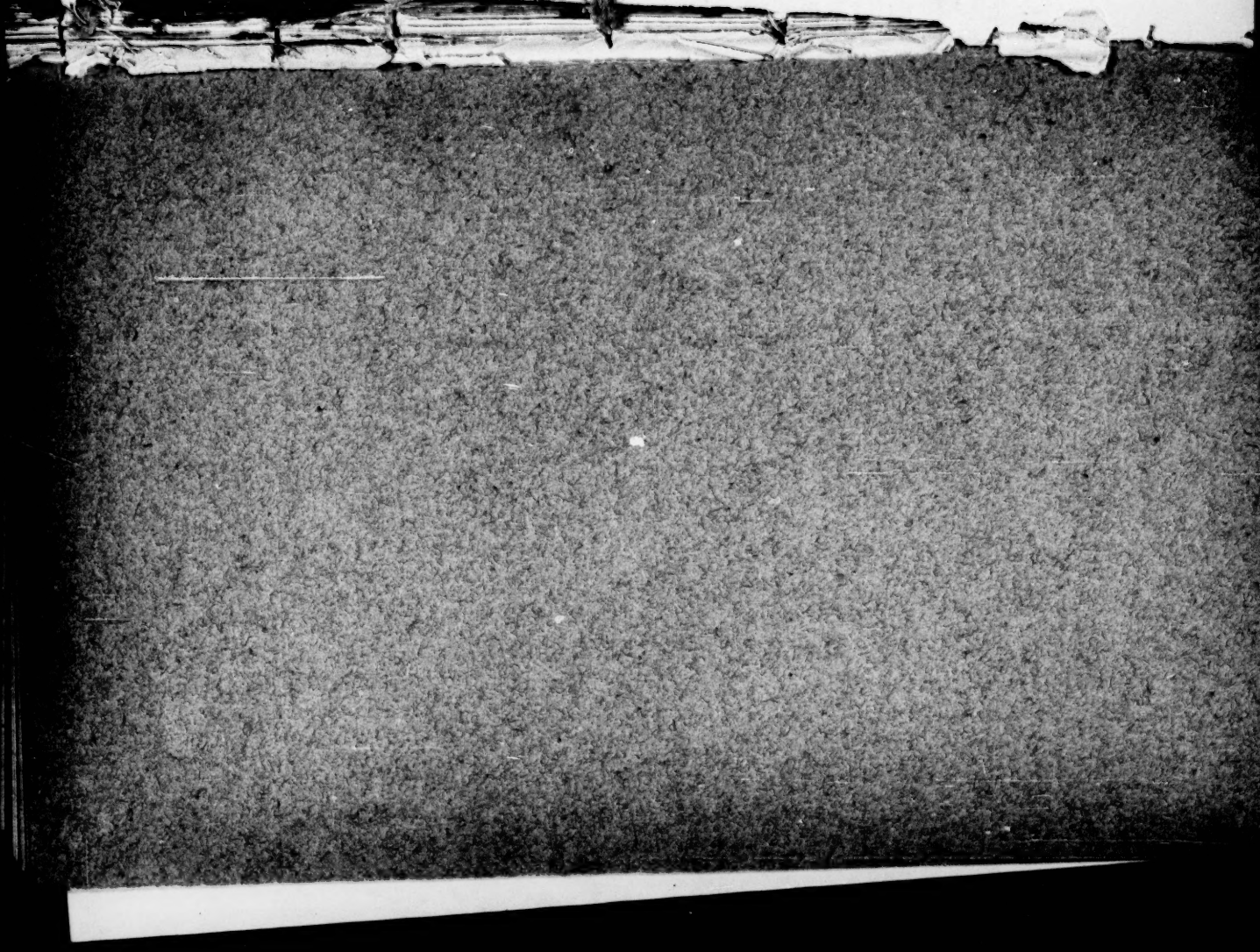
SEGRIST ET AL. *vs.* CRABTREE.

MOTION BY THE PLAINTIFFS IN ERROR FOR A CERTIORARI.

BRIEF FOR THE DEFENDANTS.

S. F. PHILLIPS,
LAMAR & ZACHRY,
For Crabtree.

JUDD & DETWEILER, PRINTERS.



Supreme Court of the United States.

OCTOBER TERM, 1888.

No. 115.

SEGRIST ET AL. *vs.* CRABTREE.

MOTION BY THE PLAINTIFFS IN ERROR FOR A CERTIORARI.

BRIEF FOR THE DEFENDANTS.

The record shows,—and the suggestions upon which the motion here is based agree,—that after the present defendants in error (then plaintiffs) had obtained a verdict and judgment in a district court of New Mexico, the present plaintiffs in error took an appeal therefrom to the supreme court of that Territory, and that in the latter court errors were assigned and argued, and the judgment below affirmed. Upon the latter judgment the present writ of error was sued out.

The present motion does not suggest that the record now before this Court is not the very record that was submitted to and passed upon by the Territorial supreme court. It is admitted, indeed, that this is that very record.

It is, however, suggested on behalf of the motion that the record of *the district court* was not properly carried up into the Territorial supreme court, and the present application is for a correction of that *district court record.* In other words,

the plaintiffs in error apply to have a record made now for the use of this COURT which has never been before the court to which *error* is imputed.

It is submitted that the question raised by the plaintiffs in error is, and can be, *only*, whether *the supreme court* of New Mexico has erred, and that to test this question it is indispensable to have here *the very record upon which that court passed:*—so that the proposed amendment is inadmissible.

If other objections are pertinent, it is further submitted:

That the Record shows (p. 7) that upon application by Mr. Thornton, the plaintiffs in error were allowed from August 11, 1884, to November 1, 1884, and afterwards to December 1, 1884, to prepare the district court record for the appeal to the supreme court of the Territory; therefore, the appellants had abundant time for carefully preparing the record.

Again, the motion suggests that the "verdict actually rendered" was found against "*the defendant*," *not*, as appears in the record sent up, "the defendants;" and Messrs. Catron and Thornton state (see affidavits in motion paper) that the assignments of error made by them in the supreme court of New Mexico (Record, p. 28) *were based upon that actual verdict.*

Without repeating that the appellants were bound to look into the record before the supreme court of New Mexico, before assigning *error thereupon*, and that that court was misled if the circumstances were as is now suggested; it may be doubted upon the face of the present record, which is also the record that was used in the Territorial supreme court, whether the motion paper does not show some mistake as to what the appellants *then* understood the *actual verdict* to have been; for—

1. The *first* assignment of error in the Territorial supreme court (p. 28), strongly implies that the *actual verdict* was rendered against more than one defendant.

2. The *second* assignment is to the same effect.

3. The *Opinion* below called the attention of the appellants, (upon another ground,) specially to those two assignments. That *special* attention, at least, should have resulted in an application to that court for a *certiorari* if the matter now presented had then been so understood.

4. The *certificate* given by the attorneys for the appellees, (p. 28, top), indicates that they had previously been applied to therefor by persons then interested in taking the case up.

Finally, a question occurs whether the motion paper complies with *Rule* 14 of this COURT, as regards the *satisfactory account* there required for the *delay* in this application.

S. F. PHILLIPS,
LAMAR & ZACHRY,
For Crabtree.

Supreme Court of the United States.

OCTOBER TERM, 1888.

REUBEN P. SEGRIST, *et al*,
Plaintiffs in Error,

vs.

WILLIAM B. CRABTREE,
Defendant in Error.

No. 115.

Now come the plaintiffs in error, by O. D. Barrett, their counsel, and move the court for an order amending the writ of error in this cause, by striking therefrom the names of Sim Holstine and Frank E. Bell, and for cause, say:

1. It does not appear from the accompanying record that any judgment in said suit has ever been entered against said Holstine or against said Bell.

2. It does appear from said record that judgment was entered in said suit in the trial court against the other plaintiffs in error, to wit: Reuben P. Segrist, William B. Stapp, and Benjamin Stoops, (R., p. 5,) and that said judgment was affirmed by the Supreme Court of New Mexico, against said Reuben P. Segrist, William B. Stapp, and Benjamin Stoops by name, (R., p. 30.)

3. Said writ can be so amended by reference to said record.

4. Said defect has not prejudiced, and said amendment will not injure the defendant in error.

And for jurisdiction given to this court to grant the above motion, counsel respectfully refers the court to section 1005 of the U. S. R. Sts., which reads as follows:

"The Supreme Court may at any time, and in its discretion, and upon such terms as it may deem just, allow an amendment of a writ of error * * * * when the statement of the title of the action or parties thereto in the writ is defective, if the defect can be remedied by reference to the accompanying record, and in all other particulars of form: *Provided*, the defect has not prejudiced, and the amendment will not injure, the defendant in error."

O. D. BARRETT,
Counsel for Plaintiffs in Error.

Supreme Court of the United States,

October Term, 1888.

No. 115.

Reuben P. Segrist, Sim Holstine, William B. Stapp and Benjamin Stoops,
Plaintiffs in Error,
vs.
William B. Crabtree,
Defendant in Error.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

Now come the plaintiffs in error by their counsel O. D. Barrett, and suggests to the court a diminution of the record filed in the above entitled cause, in that the copy of the verdict as found on page five of said record is erroneous in that, in the fifth line it uses the word defendants, in the plural, whereas in the verdict actually rendered by the jury said word is defendant, in the singular; also in that said copy of said verdict does not include the following paragraph, which is part and parcel of said verdict as

actually rendered by the jury. "Being the value of three hundred and twenty-six head of cattle at a valuation of seventeen dollars per head, seven head of horses at thirty dollars per head and interest on the amount, $5,752, at six per cent per annum from February 1st, 1882, to August 8th, 1884."

And the plaintiffs in error pray the court for an order directed to the District Court of the Territory of New Mexico for the Fourth Judicial District thereof, for the county of San Miguel, commanding said court to cause to be forwarded to this Honorable Court, a true and correct copy of the verdict rendered by the jury in the trial court in said cause; and also for an order postponing the hearing of this cause until January next, to give time for correcting the record as aforesaid.

And for cause said plaintiffs in error say:

First. That by the verdict actually rendered it appears that but one of the four defendants, on whose pleas of not guilty issue has been joined, was found guilty, whereas by the erroneous copy of said verdict found in the record, page five, it appears that all said defendants were found guilty.

Second. Because it appears by said erroneous copy of said verdict that the plaintiffs damages were assessed in a lump sum, without regard to the number of cattle and horses alleged to have been converted or the value of the same; while the verdict as actually rendered, specifies the actual number of cattle and horses alleged to have been converted by the defendants and the value of these separately, from which it appears, taken into connection with the evidence, all of which is contained in the bill of exceptions, that the jury have assessed damages for the horses

specified against other defendants than Segrist, whereas there is no evidence proving or tending to prove, that any of the other defendants ever had any of said horses or ever saw them.

In further support of said motion, counsel respectfully refer to the affidavits respectively hereto annexed, of T. B. Catron, W. T. Thornton and O. D. Barrett, and to a certified copy of said verdict, also hereto annexed.

O. D. BARRETT,

Of Counsel for Plaintiffs in Error.

Supreme Court of the United States.

October Term, 1888.

No. 115.

Reuben P. Segrist, Sim Holstine, William B. Stapp and Benjamin Stoops,
Plaintiffs in Error,
vs.
William B. Crabtree,
Defendant in Error.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

Territory of New Mexico, } ss.
County of San Miguel. }

I, Thomas B. Catron, make oath that I was a member of the firm of Catron, Thornton and Clancy, during the entire period of the existence of said firm; that said firm were the attorneys, in the trial court and in the Supreme Court of the Territory of New Mexico, for the defendants, now plaintiffs in error in the above entitled cause; that I assisted personally in the trial of said cause before the Supreme Court of the Territory of New Mexico, and that I had no knowledge or intimation that the record in this case did not contain a true copy of the verdict of the jury rendered in the trial court until my attention was called to the fact, by O. D. Barrett, Esq., during the month of October of the present year.

The assignment of errors, found on page 28 of the record, was based on the verdict as actually rendered by

the jury and not on the erroneous copy found in the record; and said errors were argued in the appellate court below as based upon the verdict actually rendered.

I have been informed that the attorneys for William B. Crabtree, defendant in error, claim, that by stipulation between the attorneys for the respective parties to said suit, it was agreed that said copy of the record is correct. I deny that any such stipulation was ever entered into, and I deny that any such stipulation, based on error, if entered into would be binding for an instant after the discovery of the error. Stipulations made in court are for getting at the truth, and never for hiding or concealing it.

THOMAS B. CATRON.

Subscribed and sworn to before me this 12th day of November, 1888.

W. B. BUNKER,
Clerk of Fourth Judicial District Court
of the Territory of New Mexico.

(SEAL)

TERRITORY OF NEW MEXICO, }
County of San Miguel. } ss.

I, W. T. Thornton, having been first duly sworn state under oath, that I was a member of the firm of Catron, Thornton & Clancy during the entire period of the existence of said firm; that said firm were the attorneys in the trial court and in the Supreme Court of the Territory of New Mexico, for the defendants, now plaintiffs in error, in the above entitled cause; that I assisted personally in the trial of said cause in the trial court and in the Supreme Court of the Territory of New Mexico, and that I had no knowledge or intimation, that the record in this cause, did not contain a true copy of the verdict of the jury rendered

in the trial court, until my attention was called to the fact by O. D. Barrett, Esq. during the month of October or November, 1888.

The assignment of errors found on p. 28 of the record was prepared by myself and partner, Mr. F. W. Clancy, and was based on the verdict as actually rendered by the jury, and not on the erroneous copy found in the record; that until my attention was called to it by O. D. Barrett, Esq., as above stated, I had no knowledge that the record did not show such verdict as actually rendered. I further make oath that I never signed and have no knowledge that any member of said firm ever signed any agreement intending to waive the necessity of producing such verdict as originally rendered, and that the failure to have a true copy of said verdict in the record was an over-sight not brought to my knwledge until as above stated, during the month of October or November, 1888.

Affiant further states that he argued said cause in the Supreme Court of the Territory of New Mexico, and prepared the brief used upon said hearing and that at the time he did so the fact escaped his attention that the verdict actually rendered had been left out of the record and its place suppled by an incorrect copy of a part only of said verdict.

Affiant further states that said verdict as set forth in the annexed certified copy of the same, was accepted by the court and no reforming or changing of it was ever made by the court.

W. T. THORNTON.

Subscribed and sworn to before me this 14th day of November, 1888.

WILLIAM J. MILLS,
Notary Public.

(NOTARIAL SEAL.)

TERRITORY OF NEW MEXICO, County of San Miguel. } ss.

I, O. D. Barrett, make oath that I am the attorney of record for the plaintiffs in error in the above entitled suit. That I had no knowledge or intimation that the record filed in this court was not correct until, for another purpose, I was making an examination of the original record of said cause in the office of the clerk of the District Court for the county of San Miguel, in the Territory of New Mexico, in October, 1888, when I found the original verdict, a certified copy of which is hereto annexed marked exhibit "A."

I called the attention of W. T. Thornton to the error in the record and was informed by him that he and T. B. Catron had had charge of the case in New Mexico, and that the fact that a copy of the verdict actually rendered had been left out of the record, as aforesaid, had escaped him until his attention was called to it by me. I at once called the attention of Mr. Fort, one of the attorneys below for the defendant in error, to the mistake in the record, and I understood him to agree that if on examination of the original papers he found the mistake to be as represented it might be corrected by stipulation. I have, however, failed to obtain any such stipulation, but as soon as the error was discovered should have suggested a diminution of the record but for the fact of being led to believe that a stipulation would be entered into obviating any necessity for such suggestion to this Honorable Court.

O. D. BARRETT.

Subscribed and sworn to before me this 14th day of November, 1888.

WILLIAM J. MILLS.

(Notarial Seal.) Notary Public.

EXHIBIT A.

To the Hon S. B. Axtell, Judge of the First Judicial District of New Mexico:

We, the jury in the case of Crabtree *v.* Segrist and others, find the defendant guilty, and assess damages in favor of the plaintiff in the sum of Six Thousand six hundred and thirty-three .04 (6,633.04) Dollars, being the value of three hundred and twenty-six head of cattle at a valuation of seventeen dollars per head, seven head of horses at thirty dollars per head and interest on the amount, $5752, at six per cent per annum from February 1, 1882, to August 8, 1884.

JACOB GROSS,
Foreman.

Territory of New Mexico,
County of San Miguel.

No. 1391. William B. Crabtree,
vs.
Reuben P. Segrist, et al.

I, W. B. Bunker, Clerk of the Fourth Judicial District of said Territory and ex-officio Clerk of said District Court, sitting within and for the county of San Miguel, certify that the foregoing to which this certificate is attached is a true copy of the verdict returned by the jury, August 9th, 1884, in the above entitled cause.

Witness my hand and the seal of said Court this 13th day of November, 1888.

(seal) W. B. BUNKER, Clerk.

